TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 534.

JOHN M. WHEELER AND WILLIAM T. HOWES, PLAINTIFFS IN ERROR,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED FEBRUARY 21, 1900.

(17,648.)

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between John M. Wheeler and William T. Howes, plaintiffs in error, and The New York, New Haven & Hartford Railroad Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the
b Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of January, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

c [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *v.* The New York, New Haven and Hartford Railroad Company, defendant in error. Writ of error. Original.

d UNITED STATES OF AMERICA, *ss:*

To the New York, New Haven & Hartford Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein John M. Wheeler and William T. Howes are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 30th day of January, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

e [Endorsed:] Citation. Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Citation in error, original.

On this first day of February, in the year of our Lord one thousand nine hundred, personally appeared Wm. B. Boardman before me, the subscriber, a notary public for the State of Connecticut, and makes oath that he delivered a true copy of the within citation to William D. Bishop, Jr., as he is the secretary of The New York, New Haven and Hartford Railroad Company, the defendant in error, and that said Bishop is such secretary.

Sworn to and subscribed the first day of February, A. D. 1900.

[Seal of George P. Carroll, Notary Public, Bridgeport, Conn.]

GEORGE P. CARROLL,
Notary Public for the State of Connecticut.

BRIDGEPORT, CONN., *Feb. 1st*, 1900.

This is to certify that a copy of the within citation was served on me this day.

WM. D. BISHOP, JR.,
Secretary of the New York, New Haven & Hartford Railroad Company.

DISTRICT OF CONNECTICUT:

BRIDGEPORT, CONNECTICUT, *Feb. 6th*, 1900.

I certify that I served the within citation by leaving a true & attested copy in the hands of William D. Bishop, Jr., as he is the secretary of the within-named The N. Y., N. H. & H. R. R. Co.

Attest: EDSON S. BISHOP,
U. S. Marshal,
By JOHN H. CLARKE, *Deputy.*

Fees.

Travel, 20 miles @ 6	1.20
Service	2.00
Endorsem't	.12
	$3.42

f Know all men by these presents that we, John M Wheeler and William T. Howes, both of Bridgeport, Conn., as principals, and Allan W. Paige, of said Bridgeport, as surety, are held and firmly bound unto the New York, New Haven and Hartford Railroad Company in the full and just sum of five hundred dollars, to be paid to the said obligee, The New York, New Haven and Hartford Railroad Company, its certain attorneys, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 30th day of January, in the year of our Lord one thousand and nine hundred.

Whereas lately, at a session of the supreme court of errors of the State of Connecticut, in a suit depending in said court between The New York, New Haven and Hartford Railroad Company, the obligee, defendant in error, and John M. Wheeler and William T. Howes, the principals of this bond, obligors, plaintiffs in error, a judgment was rendered against the said plaintiffs in error, and the said plaintiffs in error having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to said defendant in error, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said plaintiffs in error shall prosecute said writ of error to effect
g and answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN M. WHEELER. [SEAL.]
WM. T. HOWES. [SEAL.]
ALLAN W. PAIGE. [SEAL.]

Sealed and delivered in presence of—
CARRIE B. WILSON.

STATE OF CONNECTICUT, }
Fairfield County, Bridgeport. }

Personally appeared the above-named Carrie B. Wilson, who, being duly sworn, deposes and says that she saw the within-named John M. Wheeler and William T. Howes and Allan W. Paige sign, seal, and, as their free act and deed, deliver the within-written bond.

CARRIE B. WILSON.

Subscribed and sworn to before me this 12th day of January, 1900.

[NOTARIAL SEAL.] GEORGE P. CARROLL,
Notary Public.

h STATE OF CONNECTICUT, } *ss:*
Fairfield County, Bridgeport, }

Personally appeared the above-named John M. Wheeler, William T. Howes, and Allan W. Paige, who, being duly sworn, severally deposes and says, each of and for himself, that he is worth the sum of five hundred dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

JOHN M. WHEELER.
WM. T. HOWES.
ALLAN W. PAIGE.

Subscribed and sworn to before me this 12th day of January, 1900.

[NOTARIAL SEAL.] GEORGE P. CARROLL,
Notary Public.

Approved by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

January 30th, 1900.

i [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Bond. Copy.

j JOHN M. WHEELER and WILLIAM T. HOWES, Plaintiffs in Error, *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant in Error. } Assignment of Errors and Prayer for Reversal.

The plaintiffs in error make the following assignment of errors which they aver occurred in the final judgment of the supreme court of errors of the State of Connecticut, at its October term, A. D. 1899, on or about the second day of January, A. D. 1900, herein: That error was committed in deciding against the right specially set up and claimed by the plaintiffs in error under section 1 of

article fourteen of the articles in addition to and amendment of the Constitution of the United States of America and under the provisions thereof, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and in so deciding against said right said supreme court of errors decided adversely as follows:

I. In overruling the claims of the plaintiffs in error raised by their demurrer to a certain amended application, dated May 5, 1899, and brought by the defendant in error to the Honorable Ralph Wheeler, a judge of the superior court of the State of Connecticut, in which application the defendant in error requested said judge to appoint appraisers to estimate such damages as
k should arise from the taking and occupation of certain real estate described in said application and belonging to the plaintiffs in error, in which demurrer a reason of demurrer therein set forth was as follows:

In view of the fact that the agreement and plans, annexed to said application by amendment, and the vote of the board of directors of said The New York, New Haven and Hartford Railroad Company provide that in substitution of the present two main tracks of the company which pass through the city of Bridgeport, and which cross twenty one or more highways at grade, said company shall construct through said city an elevated structure crossing said highways above grade and wide enough to accommodate four main railroad tracks and nearly twice as wide as would be necessary to accommodate said two tracks if so elevated; shall acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; shall erect a part of said structure on said land so to be acquired; shall connect two parts of said land so to be acquired by means of a new drawbridge wide enough to accommodate four main railroad tracks, and shall construct alongside a part of said structure and in part on said land so to be acquired a fifth or spur track at grade with quite a number of said highways which will continue to be crossed at grade by said fifth track; and in view of the fact that by said agreement it is further provided that said city shall pay to said company one-sixth of the entire cost of all of such work of construction and of the expense of the land so to be acquired, and also of certain land already acquired for the purpose of said four-track construction, and also
l of all damages to property resulting from changes of grade of said company's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars (all of which appears as a matter of law from an inspection of the application as amended)—in view of these facts, if said payments shall be made by said city, they will be a reimbursement to said company for expenses to be incurred by it in doing work and in acquiring land not necessary or germane to the work of eliminating crossings at grade of said two

present main tracks over said highways, and under these circumstances the taking and condemnation of said Wheeler & Howes' property described in the application will be in furtherance of and as part and parcel of a scheme whereby the city of Bridgeport will contribute and make donation to said company of the credit, money, and property of said city and of its property owners and tax-payers in aid of said railroad company, contrary to the provisions of the twenty-fifth amendment to the constitution of the State of Connecticut and the taking and condemnation of said Wheeler & Howes' said property will be a taking thereof without due process of law and contrary to the provisions of section 1 of article XIV of the amendments to the Constitution of the United States.

II. In overruling the same claims of law made by the plaintiffs in error, and made in view of the same state of facts upon the issue of fact raised by their first defense to said application.

m III. In entering up judgment appointing appraisers as requested in said application.

And the plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment.

ROBERT E. DE FOREST,
Attorney for Plaintiffs in Error.

January 12th, 1900.

n [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Assignment of errors and prayer for reversal. Copy. Robert E. De Forest, attorney for plaintiffs in error, Bridgeport, Conn.

o

JOHN M. WHEELER and WILLIAM T. HOWES, Plaintiffs in Error,
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD Railroad Company, Defendant in Error.
} Petition for Writ of Error.

To the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States:

The petition of the above-named plaintiffs in error showeth that at the October term, A. D. 1899, on or about the second day of January, A. D. 1900, the supreme court of errors of the State of Connecticut, the highest court of that State in which a decision could be had, entered a final judgment herein in favor of the defendant in error, The New York, New Haven and Hartford Railroad Company, and against the plaintiffs in error, in which certain judgment certain errors were committed to the prejudice of the plaintiffs in error, among which are these, to wit, in deciding against the right

specially set up and claimed by the plaintiffs in error under section 1 of article fourteen of the articles in addition to and amendment of the Constitution of the United States of America and under the provisions thereof, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;" and in so deciding against said right said supreme court of errors decided adversely as follows:

p I. In overruling the claims of the plaintiffs in error raised by their demurrer to a certain amended application dated May 5, 1899, and brought by the defendant in error to the Honorable Ralph Wheeler, a judge of the superior court of the State of Connecticut, in which application the defendant in error requested said judge to appoint appraisers to estimate such damages as should arise from the taking and occupation of certain real estate described in said application and belonging to the plaintiffs in error, in which demurrer a reason of demurrer therein set forth was as follows:

In view of the fact that the agreement and plans, annexed to said application by amendment, and the vote of the board of directors of said The New York, New Haven and Hartford Railroad Company provide that, in substitution of the present two main tracks of the company, which pass through the city of Bridgeport and which cross twenty-one or more highways at grade, said company shall construct through said city an elevated structure crossing said highways above grade and wide enough to accommodate four main railroad tracks, and nearly twice as wide as would be necessary to accommodate said two tracks if so elevated; shall acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; shall erect a part of said structure on said land so to be acquired; shall connect two parts of said land so to be acquired by means of a new drawbridge wide enough to accommodate four main railroad tracks, and shall construct

q alongside a part of said structure and in part on said land so to be acquired a fifth or spur track at grade with quite a number of said highways, which will continue to be crossed at grade by said fifth track; and in view of the fact that by said agreement it is further provided that said city shall pay to said company one-sixth of the entire cost of all of such work of construction and of the expense of the land so to be acquired, and also of certain land already acquired for the purpose of said four-track construction, and also of all damages to property resulting from changes of grade of said company's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars (all of which appears as a matter of law from an inspection of the application as amended)—in view of these facts, if said payments shall be made by said city, they will be a reimbursement to said company for expenses to be incurred by it in doing work and in acquiring land not necessary or germane to the work of eliminating crossings at grade of said two present main

tracks over said highways, and under these circumstances the taking and condemnation of said Wheeler & Howes' property described in the application will be in furtherance of and as part and parcel of a scheme whereby the city of Bridgeport will contribute and make donation to said company of the credit, money, and property of said city and of its property-owners and tax payers in aid of said railroad company, contrary to the provisions of the twenty-fifth amendment to the constitution of the State of Connecticut,
r and the taking and condemnation of said Wheeler & Howes' said property will be a taking thereof without due process of law and contrary to the provisions of section 1 of article XIV of the amendments to the Constitution of the United States.

II. In overruling the same claims of law made by the plaintiffs in error and made in view of the same state of facts upon the issue of fact raised by their first defense to said application.

III. In entering up judgment appointing appraisers, as requested in said application.

Wherefore the plaintiffs in error pray that a writ of error may issue in their behalf to the supreme court of errors of the State of Connecticut for the correction of errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT E. DE FOREST,
Attorney for Plaintiffs in Error.

January 12th, 1900.

s [Endorsed:] Supreme Court of the United States. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company, defendant in error. Petition for writ of error. Copy. Robert E. De Forest, attorney for plaintiffs in error, Bridgeport, Conn.

t To all persons to whom these presents shall come, Greeting:

In pursuance of the command of the writ of error, within, I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut for the third judicial district, herewith transmit a true copy of the record and all proceedings in the case of The New York, New Haven and Hartford Railroad Company against John M. Wheeler and William T. Howes, lately pending in the supreme court of errors of the State of Connecticut for the third judicial district, in the words and figures following, to wit:

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said State of Connecticut, this 20th day of February, 1900.

WM. R. SHELTON, *Clerk.*

1 Supreme Court of Errors, Third Judicial District, October Term, 1899.

N. Y., N. H. & H. R. R. Co. }
vs. }
Wheeler & Howes. }

Defendant's Appeal.

To the Honorable R. Wheeler, a judge of the superior court:

The application of the New York, New Haven and Hartford Railroad Company, a railroad corporation under the laws of this State, respectfully represents:

1. On December 21, 1895, said railroad company and the city of Bridgeport, under the provisions of and by authority of a special act of the General Assembly of the State of Connecticut, passed at its January session, 1895, and entitled An act "providing for the abolition of grade crossings in Bridgeport," duly executed a certain agreement.

2. On December 21, 1895, said railroad company and said city, pursuant to the provisions of said special act, brought their application to the railroad commissioners of this State for their approval of said agreement.

3. On January 23, 1896, said railroad commissioners, after due notice and hearing, made their order and finding approving said agreement and each and every of its provisions, and the same thereby became and ever since has been and still is an order of said railroad commissioners, as to all matters therein contained or referred to.

4. A copy of said agreement and of the plans therein referred to and made a part thereof, and of said order and finding of said
2 railroad commissioners approving the same *are* on file in the offices of the town clerk and of the city clerk in said city of Bridgeport, reference to which is hereby had, and the same *are* made a part of this application, and marked Exhibits A and B.

5. In order properly to carry out in any and all particulars, as called for in said plans, the work imposed upon said railroad company by said special act and agreement and said order and finding of said railroad commissioners, said company deemed it necessary to take all those certain pieces or parcels of land as shown on said plans, and on July 11, 1896, the board of directors of said company passed the following resolution, viz:

"Resolved, That this company, with the approval of the railroad commissioners, so far alters the location of its road in the city of Bridgeport, as to change the radius of its curves, straighten and improve its lines, width and extent of depot grounds, slopes and embankments, and extend its lines of sight, and for said purposes, and for additional tracks, turnouts, freight and passenger stations and depots, hereby takes all those certain pieces or parcels of land as shown on plans referred to in a certain agreement between this company and said city, dated the 21st day of December, 1895,"

(and thereby took said land subject to the approval thereof by said railroad commissioners).

6. The following-described land constitutes one of said certain pieces or parcels of land shown on said plans referred to in said agreement, to wit: All that certain lot or parcel of land situate in said Bridgeport, bounded, northerly on Sterling street, seventy-nine and one-half (79½) feet; easterly on land of Wheeler & Howes, two hundred and seventy-three (273) feet; southerly on Bridgeport harbor, seventy-nine and two-tenths (79.2) feet; and westerly on land of said Wheeler & Howes, two hundred and five and eight-tenths (205.8) feet.

7. John M. Wheeler and William T. Howes, both of said Bridgeport, partners in business, under the firm name of Wheeler & Howes, are and for more than five years last past have been the owners of the above-described land.

8. On June 30, 1897, the railroad commissioners of this State, after due notice to said Wheeler & Howes, and after due hearing had, made their order and finding approving the taking by said railroad company of the above-described land.

9. The applicant railroad company, though it has endeavored so to do, cannot obtain said land described in paragraph 6 hereof by agreement with the said Wheeler & Howes.

3 Wherefore your applicant respectfully requests your honor to appoint appraisers to estimate all damages that may arise to the above mentioned Wheeler & Howes, from the taking and occupation of said real estate for the purposes hereinbefore set forth in the same manner as is now provided by statute for taking land for railroad purposes.

Dated at Bridgeport, this 5th day of May, 1899.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO.,
By STODDARD & BISHOP, *Its Attorneys.*

Ordered: That the foregoing application be heard before me in the superior court room at the court-house in Bridgeport, on the 10th day of May, 1899, at 10 o'clock in the forenoon, and that notice thereof be given to the said John M. Wheeler and William T. Howes, by some proper officer or indifferent person, by leaving with or at the usual place of abode of the said Wheeler & Howes, on or before the 6th day of May, 1899, a true and attested copy of said application and of this order.

Dated at Bridgeport, Conn., the 5th day of May, 1899.

RALPH WHEELER,
A Judge of the Superior Court.

EXHIBIT A.

N. Y., N. H. & H. R. R. Co. vs. WHEELER & HOWES. } Application for Appointment of Appraisers. Before Hon. Ralph Wheeler, May 5, 1899.

Copy of Agreement Referred to in the Foregoing Application.

Whereas, the General Assembly of the State of Connecticut at its last session, passed a resolution which was approved June 22, 1895, and which provides that, in order that the safety of the public may be insured, all crossings at grade over the main tracks of the railroad of the New York, New Haven & Hartford Railroad Company in the city of Bridgeport, shall be abolished, and also that said city and said railroad company may, within six months after the
4 passage of said resolution, agree upon the manner, plans, method and time in which said crossings at grade shall be abolished, and upon all other matters mentioned in section 5 of said resolution, and what amount or what proportion or what items of the cost thereof shall be paid by the city of Bridgeport, and for the purpose of making said agreement, empowered the mayor of said city of Bridgeport and William E. Seeley and Frederick S. Stevens, to act for said city.

Now, therefore, in accordance with the provisions of said resolution of the General Assembly, and subject to the approval of the board of railroad commissioners, the said city of Bridgeport, acting herein by its agents, Hon. Frank E. Clark, its mayor, and the said William E. Seeley, and Frederick S. Stevens, thereunto duly authorized by said resolution, and said New York, New Haven & Hartford Railroad Company, acting herein by John M. Hall, its vice-president, hereunto duly authorized, do hereby agree as follows:

1. For the purpose of abolishing the crossings aforesaid, the location, grade and plan of said railroad through said city and the number of its tracks, shall be substantially as shown upon the plans marked "Plans for the abolition of grade crossings on main line, N. Y., N. H. & H. R. R., city of Bridgeport, Conn.," said plans being signed by the respective agents of the parties hereto, and the work of excavation, construction, alteration and grading of said tracks, streets, approaches, bridges, and abutments, according to said plans, shall be done by said railroad company, both upon its own lands and upon the highways affected by said plans, except as hereinafter specifically otherwise provided. The grades of the railroad tracks and of the highways shall be as shown upon said plans. The stone abutments of all bridges shall be of equal workmanship to the abutments of the existing bridge across Fairfield avenue (west) unless modified by the railroad commissioners. Said railroad company, during the progress of said work, shall have the free use of such streets or portions of streets, and the right to temporarily close such streets as may be necessary for the convenient prosecution of the

work. Crescent avenue and Railroad street are hereby extended from their present easterly termini to the westerly line of the proposed freight station yard of said railroad company east of Central avenue; and East Washington avenue shall be extended and constructed by said city to Seaview avenue, provided said railroad company elects to lay a siding on the north side of its main tracks as hereinafter provided, and so much of South Railroad avenue between Broad and Main streets as is occupied by the structure of said railroad company, as shown on said plan, is hereby discontinued as a highway; and Clark, Wilmot and North and South Railroad avenues, west of Fairfield avenue (west), and all streets and private ways, whether existing or projected upon or across the property of said railroad company along its main-line tracks, not shown upon said plans, are hereby discon-ued, except the private ways between a point opposite the east end of Union street and Fairfield avenue (east). South Railroad avenue is hereby extended from Wordin avenue to Howard avenue forty feet wide. Said railroad company shall lay and maintain a track at grade upon the south side of South Railroad avenue from Fairfield avenue eastward to the westerly line of South avenue, free from all burdens or assessments of any kind, so long as said railroad company maintains the same; said track to be connected by proper switches with such side or spur tracks as now exist or as may be hereafter granted or permitted by said city. Said railroad companies shall bridge, as shown upon the plans, the following-named streets: Bostwick avenue, Hancock avenue, Howard avenue, Wordin avenue, Iranistan avenue, South avenue, Park avenue, Myrtle avenue, Warren street, Lafayette street, Broad street, Main street, Wall street, Fairfield avenue, Sterling street, Noble avenue, Clarence street, Kossuth street, East Main street, Pembroke street, Hallett street, Seaview avenue, Central avenue, and Bishop avenue, with the headroom in each case of not less than twelve feet in the clear between the crown of the street and the bottom of the girder, unless otherwise shown on the plans.

The location of the pipes, wires, poles or tracks of any water, gas, telephone, electric light, telegraph or power company, or street railway company, and all public or private sewers or drain pipes, shall be changed at the expense of said several companies, whenever in any manner they interfere with the prosecution of said work, or the construction or maintenance of the same, according to said plans, in such manner or in such time as the board of railroad commissioners shall order.

For the accommodation of the manufacturing and other shippers in East Bridgeport, said railroad company shall construct a fifth track leading from its proposed freight station in East Bridgeport, or from some point between said freight station and Seaview avenue to the easterly line of Hallett street and the same may be placed either on the north or south side of the main tracks, but shall cross Seaview avenue on a level with said main tracks. Such fifth track shall be considered as a part of the work herein provided for, and shall be included in the cost thereof, and said railroad company shall

have the right to use such portion of any street or streets im-
6 mediately adjoining the railroad location as may be neces-
sary for the location and maintenance of such fifth track, and said company shall be free from all burdens and assessments on account of said fifth track so long as it shall maintain the same.

2. It is understood and agreed that the work herein provided for shall commence on or before the first day of April, 1896, and proceed as rapidly as practicable until finished.

3. In consideration whereof said city hereby agrees to pay to said railroad company one-sixth of the entire cost of constructing a four-track railroad from Fairfield avenue (west) to Bruce's Brook, as by the alignment and grade shown on the plans above named, including the work done in the highways as per said plans, and including all bridges ready for ties, and all damages to property resulting from the change of grade of said railroad or street or ways, or the discontinuance of the same or parts thereof, and the cost of and damages to all lands which have been or may be acquired by said railroad company for the purposes of said four-track construction, together with a reasonable allowance for the services and expenses to the date hereof of Frank E. Clark, William E. Seeley and Frederick S. Stevens, the persons appointed by said resolution to act for said city, and for such service as is imposed upon them by the provisions of this agreement; provided that the total cost to be paid by the said city shall not exceed in the aggregate the sum of four hundred thousand dollars ($400,000).

Said railroad company shall keep a detailed account of the cost of such construction, excluding therefrom the cost of the passenger station and grounds, and the approaches thereto, not required for said four-track construction, and all switches or side tracks, and all other items properly belonging to the superstructure of said railroad. In case any question shall arise between said city and said railroad company as to any items charged or claimed as a proper charge for the construction account, either by said railroad company or said city, and the said city and said railroad company cannot agree as to its allowance as a proper charge to said construction account, all such disputed items shall be left to the arbitrament of the board of railroad commissioners of the State of Connecticut, whose decision shall be final and conclusive in the matter. In case any question shall arise between said railroad company and said city as to the value of any land owned or acquired by the railroad company, or damages thereto on account of the necessary use thereof or damage thereto by the construction of said four-track railroad, and said city and said railroad company shall be unable to agree as to the value or amount thereof,
then the equitable value of the portion of such property
7 used, occupied or damaged, shall be determined by the Hon. Frank E. Clark, William E. Seeley, Frederick S. Stevens, Wm. D. Bishop, I. De Ver Warner, and James Staples, or by a majority of them, under oath, and their decision shall be final and conclusive between the parties, as to the amount properly chargeable to the cost of the work herein provided for. The amounts

paid for all items of construction, land damages, by reason of changes of grades, discontinuance of streets or parts thereof, and all damages of every kind paid on account thereof for the prosecution of said four-track construction, shall be submitted to Frank E. Clark, William E. Seeley and Frederick S. Stevens, as a committee to audit the same in behalf of said city, and shall be verified, if required, by said committee. If said committee, at any time shall neglect or refuse to audit or approve said accounts, when requested so to do, the board of railroad commissioners shall, upon the request of either party, audit such accounts, and when so audited and approved by either said committee or said railroad commissioners, as above provided, the amount thereof shall be accepted by both parties as a part of the entire cost of construction. It is further agreed that said accounts shall be audited as often as once in thirty days, if required by the railroad company, and when so audited the proportion to be paid by the city to said railroad company shall be a debt due said railroad company, and shall draw interest at the rate of five per cent. per annum until paid.

In witness whereof, the parties hereto have hereunto subscribed their corporate names, acting herein by their respective agents hereunto duly authorized, this twenty-first day of December, A. D. 1895.

CITY OF BRIDGEPORT,
By FRANK E. CLARK, *Mayor.*
WM. E. SEELEY.
FREDERICK S. STEVENS.
THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By JOHN M. HALL, *Vice-President.*
THE APPELLANT,
By STODDARD & BISHOP, *Their Attorneys.*

(Filed May 15, 1899, at 3 p. m.
R. WHEELER.)

EXHIBIT B.

(Map on file, not printed.)

7a PART OF EXHIBIT "A," to be Inserted on Page 7 of Record, before the Words—

"(Filed May 15, 1899, at 3 p. m. R. Wheeler.)"

STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *January* 23, 1896.

Be it remembered, that the City of Bridgeport and the New York, New Haven & Hartford Railroad Company presented their petition to us, dated December 21, 1895, as follows, viz:

NEW HAVEN, *December* 21, 1895.

To the honorable board of railroad commissioners of the State of Connecticut.

GENTLEMEN: We herewith submit to your honorable board for approval an agreement duly executed by the City of Bridgeport and the New York, New Haven & Hartford Railroad Company, together with the plans referred to in said agreement, under the provisions of section 2 of the resolution of the last General Assembly, providing for the abolition of the grade crossings in the city of Bridgeport.

We respectfully request your approval of the same, and such action in the matter as is provided by said resolution of the General Assembly.

Yours respectfully,

CITY OF BRIDGEPORT,
By FRANK E. CLARK, *Mayor.*
WM. E. SEELEY.
FREDERICK S. STEVENS.
THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
By JOHN M. HALL, *Vice-President.*

Upon which petition the following order of notice for hearing was by us made on the 3d day of January, 1896, viz:

STATE OF CONNECTICUT,
OFFICE OF THE RAILROAD COMMISSIONERS,
HARTFORD, *January* 3, 1896.

Upon the foregoing application it is ordered that the matter of the approval of said agreement be heard at the common
7*b* council chamber in said Bridgeport, on Wednesday, the 15th of January, 1896, at 12 o'clock noon, and that notice thereof be given to all persons interested to appear and be heard thereon, by publishing a copy of said application and of this order in the Standard, the Farmer, the Post and the Union, newspapers published in said Bridgeport, for at least one week preceding said day of hearing.

GEO. M. WOODRUFF,
WM. O. SEYMOUR,
ALEX. C. ROBERTSON,
Railroad Commissioners.

And on said 15th day of January, we met at the time and place named in said order of notice, when it appeared, and we do find that said order had been complied with, and reasonable notice of the time and place of hearing given to the parties interested, and said City of Bridgeport and said New York, New Haven and Hartford Railroad Company appeared to prosecute their said petition, and F. J. Mooney and others, by their attorneys, De Forest & Klein, also appeared and filed their protest, as follows, viz:

BRIDGEPORT, CONN., *January* 15, 1896.

To the hon. the railroad commissioners of the State of Connecticut.

GENTLEMEN: A notice having been published that your board will hold a session in Bridgeport, on Wednesday, the 15th day of January, to hear all parties in interest upon an application made to you for your approval of a certain pretended contract between the City of Bridgeport, and the New York, New Haven & Hartford Railroad Company relative to grade crossings and other matters, in behalf of certain property-owners, citizens and tax-payers of said city, we respectfully protest against any such action upon your part for the reason that said pretended contract is in no respect authorized or approved by said city, and that said city has no power to make, approve, authorize or enter into such a contract, or to submit the same to you for approval, and that the use of the name of said city in said application is entirely without the authority or approval of said city, and that the persons assuming to act for said city in the matter of said contract have and had no authority so to do.

We call your attention to the fact that the said city has never applied through its common council or otherwise to you for the abolition of said grade crossings, but on the contrary, has
7c distinctly declined so to do, and the obligation to eliminate them at their own expense rests solely upon said railroad company under the general law of the State; that the said work, together with the elevation of the tracks of said company at other points in said city, the addition of two tracks to those already used by said company, and all the other changes and improvements contemplated in said pretended contract, are strictly in the interest and a part of the business of said railroad company, and that no part of the expense of the same can be lawfully assumed by, or imposed upon said city; that any attempt to do so is in violation of the rights of said city and its tax-payers, and in conflict with the express provisions of the constitution of our State, and that, therefore, the said pretended contract, and the pretended statute under which said contract purports to be made, and all proceedings which have been attempted or taken, or which may hereafter be attempted under the same, are unconstitutional, illegal, void, and in fraud of the tax-payers of said city.

DE FOREST & KLEIN,
Attorneys for F. J. Mooney and Others.

Which protest was by us overruled, disallowed and dismissed; and no one else appearing to oppose the petition, we, on consideration, did find that all the crossings at grade over the main tracks of said railroad company in the city of Bridgeport are dangerous to the public travel; that public safety requires alterations in said crossings; that, in order that the safety of the public may be insured, all said crossings at grade should be abolished; that the manner, plans, methods, and time in which the said crossings at grade shall be abolished, and all other matters mentioned in section 6 of the resolution of the General Assembly of this State, "provid-

ing for the abolition of grade crossings in Bridgeport," approved June 22, 1895, as stipulated in said agreement, will accomplish the object of said resolution and fulfill all the requirements of public convenience and necessity; that the apportionment of the cost between the city and the railroad company, and the methods for ascertaining the amount of the cost thereof to be paid by said city, as stipulated in said agreement, are in all respects reasonable and equitable as between the parties, and that said agreement is in accordance with, and within the provisions of, the said resolution of the General Assembly.

Wherefore, the undersigned board of railroad commissioners, acting under the authority of said resolution, hereby approve said agreement, and each and every of its provisions.

7*d* And we do hereby determine and order that said agreement be executed according to its terms, and that the changes in the manner in which the tracks of said railroad shall be carried through said city shall be made as shown upon said plans and stipulated in said agreement; that the highways and private ways shall be carried across said railroad, that the highway and private ways and parts thereof shall be discontinued and closed, and that new highways shall be laid out, all as shown on said plans and stipulated in said agreement; and we do hereby determine that the time within which and the manner in which said changes shall be made, shall be in accordance with the stipulations in said agreement, and we do hereby require said railroad company to make such changes in the grade, alignment, radii of curves, and location of the tracks of said company, and to make such changes in the grades, lines and width of streets and highways as shown on said plans and stipulated in said agreement; and we do authorize and require said railroad company to construct a new drawbridge across the navigable waters of Bridgeport harbor, and determine the place where the draw in said bridge shall be constructed, as shown on said plans and as stipulated in said agreement; and we deem necessary and proper for the due execution of the purposes of said resolution, and do order that streets in said city be temporarily used, occupied and closed as stipulated in said agreement, and that the number of tracks to be constructed by said railroad company shall be as shown on said plans and stipulated in said agreement; and we do direct that said railroad company shall do all the work of excavation, construction, alteration and grading of said tracks, streets, approaches, bridges and abutments required in doing said work, according to said plans and as stipulated in said agreement.

And as to any matters requiring our further order in the premises we will hear and determine the same from time to time upon the application of either party to said agreement.

GEO. M. WOODRUFF,
WM. O. SEYMOUR,
ALEX. C. ROBERTSON,
Railroad Commissioners.

8 THE N. Y., N. H. & H. R. R. Co. } Before Hon. Ralph Wheeler,
vs. } a Judge of the Superior
WHEELER & HOWES. } Court, May 15, 1899.

Demurrer to Amended Application.

The defendants demur to the application, in the above matter, amended, pursuant to the order of his honor this day made, by annexing to the application as a constituent part thereof, a copy of the agreement referred to in said application and a copy of the plans referred to in said agreement; and for reasons of said demurrer they assign the following:

1. Because no facts appear showing that the applicant has or has ever had the right to take the real estate of the defendants therein referred to, for railroad purposes or for any purpose.

2. Because said agreement and plans and the vote of the applicant's board of directors provide that, in substitution of the present two main tracks of the applicant, which pass through the city of Bridgeport, and which cross twenty-one or more highways at grade, the applicant shall construct through said city an elevated structure crossing said highways above grade and wide enough to accommodate four main railroad tracks, and nearly twice as wide as would be necessary to accommodate said two tracks if so elevated; shall acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; shall erect a part of said structure on said land so to be acquired; shall connect two parts of said land so to be acquired by means of a new draw-bridge wide enough to accommodate four main railroad tracks; and shall construct alongside a part of said structure and in part on said land so to be acquired, a fifth or spur track at grade with quite a number of said highways which will continue to be crossed at grade by said fifth track. By said agreement it is further provided that said city shall pay to the applicant one-sixth of the entire cost of all of such work of construction and of the expense of land so to be acquired and also of certain land already acquired for the purpose of said four-track construction and also of all damages to property resulting from changes of grade of the applicant's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars. If said payments shall be made by said city, they will be a reimbursement to the applicant for expenses to be incurred by it in doing work and in ac-
9 quiring land not necessary or germane to the work of eliminating the crossings at grade of said two present main tracks over said highways. Under the circumstances, as above set forth, the taking and condemnation of the defendants' property, as described in the application, will be for purposes not authorized by the special act of 1895, p. 416, and will be contrary to the provisions of the twenty-fifth amendment to the constitution of this State and of section 1 of article XIV of the amendments to the Constitution of the United States.

3. Because it appears that said pretended contract was not other

wise executed on the part of said city than by the said individuals—Clark, Stevens and Seeley, assuming to attach the name of said city thereto, and because it does not appear that said city ever authorized said individuals to act in its behalf in executing or in any manner making said pretended contract.

4. Because it does not appear from said application or from said contract or specification that said pretended contract is within the authority of and in accordance with said special act of the legislature.

5. Because it appears from the details of said contract that it is not within the authority of or in compliance with said special act of the legislature.

6. Because it appears from the provisions of said special act of the legislature that said act is unconstitutional as contravening the twenty-fifth amendment of the constitution of this State and section 1 of article XIV of amendment of the Constitution of the United States.

7. Because it appears that the pretended doings of said railroad commissioners were founded upon said special act of the legislature and because it does not appear by the provisions of said act said railroad commissioners ever had any jurisdiction or authority to act in the premises.

8. Because it appears by the said vote of the applicant's board of directors that the land of the defendant is not desired or needed for the purposes specified in said special act of the legislature, but for the purposes set forth in said vote; and that the city of Bridgeport will be called upon to reimburse the applicant for the taking of said property for the purposes specified in said vote and not for the purpose of eliminating grade crossings.

THE DEFENDANTS,
By DE FOREST & KLEIN AND
PAIGE & CARROLL,
Their Attorneys.

(Filed May 15, 1899, at 3 p. m.)

10 Demurrer overruled on the ground that each and every reason therein stated is insufficient.

R. WHEELER, *J.*

May 15, 1899.

Exception taken to the overruling of demurrer.

R. WHEELER, *J.*

THE N. Y., N. H. & H. R. R. Co. *vs.* WHEELER & HOWES. } Before Hon. Ralph Wheeler, a Judge of the Superior Court, May 15, 1899.

Answer to Amended Application.

First defense.

1. As to par. 1, it is admitted that said agreement there referred to, and now by amendment made a part of the application, was

signed by the Messrs. Clark, Seeley and Stevens, named in the special act, but the defendants allege that said city of Bridgeport never authorized said persons to act for it in regard to said agreement, or in regard to any agreement with the applicant in relation to the matters referred to in said agreement.

2. As to par. 2, it is denied that said city then, or at any time, brought any such application as is there alleged, unless the same be implied in law from the fact, which is admitted, that said three persons, claiming and purporting to act for said city, brought such an application.

3. Par. 3 is admitted as far as and including the word "provisions" in the third line thereof. The rest of said paragraph is denied.

4. Par. 4 is admitted.

5. Par. 5 is admitted so far as it alleges that said board of directors passed said vote. The rest of said paragraph is denied.

6. Par. 6 is admitted.

7. Par. 7 is admitted.

8. Par. 8 is admitted.

9. Par. 9 is denied.

11 Second defense.

1. The agreement, and the plans made a part thereof, referred to in the application, and the vote of the applicant's board of directors provided that, in substitution of the present two main tracks of the applicant, which pass through the city of Bridgeport, and which cross twenty-one or more highways at grade, the applicant should construct through said city an elevated structure crossing said highways above grade, and wide enough to accommodate four main railroad tracks, and nearly twice as wide as would be necessary to accom-odate said two tracks if so elevated; should acquire and pay for land not necessary or germane to the work of eliminating grade crossings in said city; should erect a part of said structure on said land so to be acquired; should connect two parts of said land so to be acquired by means of a new drawbridge wide enough to accommodate four main railroad tracks; and should construct alongside a part of said structure and in part on said land so to be acquired, a fifth or spur track at grade with quite a number of said highways which will continue to be crossed at grade by said fifth track.

2. By said agreement it was further provided that the said city should pay to the applicant one-sixth of the entire cost of all of such work of construction and of the expense of land so to be acquired and also of certain land already acquired for the purpose of said four-track construction, and also of all damages to property resulting from changes of grade of the applicant's railroad and of any highway, provided that the total amount so to be paid by said city should not exceed four hundred thousand dollars.

3. If said payments shall be made by said city, they will be a reimbursement to the applicant for expense to be incurred by it in doing work and in acquiring land not necessary or germane to the

work of eliminating the crossings at grade of said two present main tracks over said highways.

THE DEFENDANTS,
By DE FOREST & KLEIN AND
PAIGE & CARROLL,
Their Attorneys.

Filed May 15, 1899, at 5 o'clock p. m.
R. WHEELER, *J.*

May 15, 1899.

12 NEW YORK, NEW HAVEN & Hartford R. R. Company *vs.* WHEELER & HOWES. | Before Hon. Ralph Wheeler, Judge of the Superior Court, May 15, 1899.

Motion of Applicant to Strike Out Second Defense of the Answer to the Amended Application.

The applicant moves that the second defense be stricken out on the following grounds:

1st. The allegations therein have already been adjudged by this tribunal improper as an answer to this application, and have been stricken out.

2nd. The same are irrelevant and impertinent.

3rd. The allegations contained in said defence disclose no reasonable ground of defence to the application.

THE NEW YORK, NEW HAVEN &
HARTFORD RAILROAD CO.,
By STODDARD & BISHOP, *Its Attorneys.*

(Filed May 17th, 1899.
R. WHEELER, *J.*)

Motion granted on the grounds stated in 2d and 3d paragraphs. May 17, 1899.—Exception noted.

R. WHEELER, *J.*

In the Matter of the Application of THE N. Y., N. H. & H. R. R Co. *vs.* JOHN M. WHEELER and WILLIAM T. Howes, Both of Bridgeport. | Before Ralph Wheeler, Judge of the Superior Court, Fairfield County, May 25th, 1899.

Judgment.

In the matter of the foregoing application of the New York, New Haven & Hartford Railroad Company, it is found that reasonable notice thereof has been given to all parties in interest, to wit: John M. Wheeler and William T. Howes, in accordance with the
13–17 order of notice by me heretofore made, and by due continuance, the cause comes to this day; and now after due hearing had at the time and place stated in said order of notice and

at other times by legal continuance, the demurrer of the defendants to the application, amended by the filing of Exhibits A and B, having been overruled, and the motion of the plaintiff, filed May 17th, 1899, to strike out the second defense of the answer to the amended application, having been granted for the second and third reasons stated in said motion, I find the issues of fact raised by the first defense to the amended application in favor of the plaintiff, and all the allegations contained in said amended application true. Whereupon I appoint Edward B Bennett and Lewis Sperry, both of the city and county of Hartford and R. Jay Walsh of the town of Greenwich in Fairfield county, appraisers to estimate all damages that may arise to said Wheeler and Howes from the taking and occupation of the land described in said application for the purposes therein set forth, in the same manner as is now provided by statute for taking land for railroad purposes.

RALPH WHEELER,
Judge of the Superior Court.

THE NEW YORK, NEW HAVEN & Hartford Railroad Company *vs.* JOHN M. WHEELER and William T. Howes.	Before the Hon. Ralph Wheeler, a Judge of the Superior Court, Sitting in Bridgeport, Fairfield County, May 31, 1899.

Notice of Appeal.

In the above-entitled matter, the defendants or respondents, said Wheeler & Howes, hereby give notice that they appeal to the supreme court of errors from the decision, judgment, decree and action of said the Hon. Ralph Wheeler, a judge of the superior court, in appointing appraisers upon said application.

DEFENDANTS OR RESPONDENTS,
By DE FOREST & KLEIN AND
PAIGE & CARROLL, *Their Attorneys.*

(Filed May 31, 1899.
R. WHEELER, *J.*)

(Filed May 31, 1899.
WM. R. SHELTON, *Clerk.*)

18 * * * * * * * *

THE NEW YORK, NEW HAVEN & Hartford Railroad Company. *vs.* WHEELER & HOWES.	Before Ralph Wheeler, a Judge of the Superior Court, Bridgeport, Sept. 18th, 1899.

Finding.

1. Upon the trial of the above-entitled cause, the only issues of fact that were joined and tried are those raised by the allegations of the amended application and by the respondents' first defense in their answer to the amended application as on file.

2. All the allegations of the application are found true.

3. Said special act was passed with the assent of the city attorney of said city, acting under the vote of the common council of
19 said city, contained among the votes and minutes of that body hereinafter referred to.

4. Said city had, at all times subsequent to the execution of said agreement, full knowledge of that fact and of the provisions of said agreement.

5. Said city has at no time and in no way expressed any disapproval of or dissent to the execution of said agreement, or any of its provisions.

6. Said city expressed no opposition to the approval of said agreement by the railroad commissioners, at a public hearing called and held in said city for that purpose by said commissioners on Jan. 15th, 1896.

7. After the execution of said agreement, the New York, New Haven & Hartford Railroad Company expended many thousands of dollars in acquiring lands and in proceedings under the terms of said agreement.

8. No city meeting of the city of Bridgeport ever passed any vote or resolution authorizing, ratifying or confirming said agreement, or authorizing the bringing of the application referred to in paragraph 2 of the application.

9. Before the execution of said agreement, the applicant had acquired and paid for at a very considerable expense, land for the purpose of constructing thereon a four track railroad through the city of Bridgeport upon the proposed route indicated on said plans.

10. The respondents objected to evidence offered by the applicant as regards its purchase of land subsequent to the execution of the agreement, said evidence being offered as relevant upon the question of assent to and ratification of said agreement by said city. I admitted the evidence and the respondents excepted.

11. From the action of the common council of said city, as disclosed by the minutes of the various meetings of that body in the premises, all which are by reference made a part of this finding, and from the failure of the city in any way to express any disapproval of the execution of said agreement or of any of its terms, I find and hold that said city assented to and ratified said agreement.

12. All the minutes and records of the actions of the common council of the city of Bridgeport, referred to in paragraphs
20 Nos. 3, 4, 5 and 6 of the finding, when offered in evidence by the plaintiff, were objected to as being irrelevant and inadmissible as showing any action by the city of Bridgeport approving, ratifying, consenting to or acquiescing in said special act of the legislature or any proceedings thereunder. But the court overruled said objection and admitted said evidence for said purpose.

13. The respondents claimed, as matters of law, that the applicants had no right to condemn or take the land in question in the manner proposed by this application, and that said application should be dismissed, because:

1. If the land of the defendants should be taken and condemned

and if the project of the applicant should be carried out as called for by said agreement and plans as proposed by the applicant, the taking and condemnation of the defendants' said property will be for purposes not authorized by the special act for the abolition of grade crossings in Bridgeport, approved June 22, 1895, and hence will be illegal and void, and said taking and condemnation will be contrary to the provisions of the 25th amendment to the constitution of this State and of sec. 1 of article 14 of the amendments to the Constitution of the United States.

2. Said special act, upon which this application is based, is unconstitutional and void, as being in violation of the 25th amendment to the constitution of this State and of sec. 1 of article 14 of the amendments to the Constitution of the United States.

3. Said pretended agreement between the city of Bridgeport and the applicant company was never executed by the city of Bridgeport within the meaning of said special act.

4. Said pretended agreement is not in accordance with or within the scope of or in any manner authorized by said special act.

5. Said pretended agreement was never presented to said railroad commissioners by the city of Bridgeport, and was never properly before said commissioners under and in accordance with the provisions of said special act.

6. Said railroad commissioners had no jurisdiction or authority of any kind to act in the premises.

7. But I overruled these claims and appointed appraisers named.

RALPH WHEELER,
Judge of the Superior Court.

(Filed Sept. 19, 1899.
WM. R. SHELTON, *Clerk.*)

(Refiled Oct. 4, 1899.
WM. R SHELTON, *Clerk.*)

21 *Extracts from the Records of the Common Council of the City of Bridgeport.*

Common council meeting of Nov. 21, 1894, city clerk's records, vol. 9, p. 110.

"Petition of John McNeil, president of the board of trade, *et al.*, for the appointment of a committee to consider the elimination of grade crossings by the railroad Co."

Common council meeting of Dec. 5, 1894, city clerk's records, vol. 9, p. 132.

"Whereas, the numerous fatal accidents occurring at the railroad crossings of Sterling, Harriet and Noble streets, where there are no gates, and at Kossuth street when the gatekeeper is off duty, where within the last few weeks a mother and father and two young men have been killed, and whereas, we understand that the railroad company has refused to place gates at the above-named

places, because they say they have perfected plans to abolish all grade crossings in Bridgeport—

Resolved, That his honor, the mayor, be requested to communicate with the officials of the N. Y., N. H. & H. R. R. Co., stating that the city is still ready to co-operate with the company in eliminating all grade crossings in Bridgeport, upon a fair, just and equitable basis, and if the company desires to show their plans and confer with the city upon this subject, the council will appoint a committee, consisting of the mayor, one alderman, one councilman and four citizens, which committee shall have power to inquire into and consider in behalf of the city, all matters pertaining to the abolition of grade crossings and change of grade by the N. Y., N. H. & H. R. R. Co. system within the limits of said city, that this whole matter may be speedily arranged and the grade crossings eliminated."

(Adopted.)

Common council meeting of Dec. 12, 1894, city clerk's records, vol. 9, p. 135.

"The following communication was received from his honor, the mayor:

"'GENTLEMEN: I deem it my duty at this time to call your attention to the following portion of my opening message to you at the first meeting of this fiscal year relative to the elimination of grade crossings in this city.

WALTER B. BOSTWICK, *Mayor*.'"

22 "The consolidated road in the city.—The matter of the relations existing between this city and the consolidated railroad company, will require much attention at your hands. In the near future, and probably before the close of my official term, the problem of the elimination of grade crossings in this city must be solved. It goes without saying that in the solution of that matter most important interests of the city, of the railroad company and of individual property-owners for a long time to come are involved. When we consider that the tracks of the company traverse the city from north to south and from east to west, from boundary to boundary, and the number of grade crossings and the importance of most of the streets crossed, and the effect directly and indirectly upon the property-owners and the general public of closing any street or changing its grade, and the expenses involved in the whole undertaking, we must acknowledge that it is the most important problem that has ever confronted this municipality. It is my desire that the city's rights shall be maintained, and that the rights of the property-owners shall be secured in the settlement of the matter. To this end our joint labors must be directed. But we should not approach the matter from the standpoint of prejudice or of hostility to the rights of the railroad company. Before the matter is finally adjusted the city will have many favors to ask of the railroad company, and the railroad company will have many favors to ask of

the city, and the parties should meet in the spirit of accommodation, and the question should be handled without needless irritation between them, and with firmness and moderation on the part of the city. I trust that you will deal with the matter in this way."

(Accepted.)

Common council meeting of Jan. 9, 1895, City Clerk's Records, vol. 9, p. 161.

"The city attorney reported as follows:

"'To the common council:

In view of the impending controversy before the General Assembly, between the city and the consolidated railroad company, over the matter of the removal of grade crossings in this city, and the possibility that objection might be made to the right or authority of the city attorney to appear in behalf of, and to represent the city in hearings before the committee of said assembly under the existing ordinances, I would recommend that your honorable body at once pass the accompanying resolution.

Dated at Bridgeport this 7th day of January, 1895.

DANIEL DAVENPORT,
City Attorney.'

23 "'Resolved, That the city attorney be, and he is hereby fully authorized and directed to appear in behalf of the city before the railroad committee or other committee of the General Assembly, in any controversy or negotiations growing out of the matter of the removal of the grade crossings in this city; and that he be directed to advise and consult with the senator and representatives from Bridgeport as to the existing provisions of the law, and as to any proposed legislation on that subject, and to draft any bill or amendment required to protect the rights and interests of this city and its tax-payers in relation thereto.'"

(Adopted.)

City Clerk's Records, vol. 9, p. 586.

Copy of Agreement Between the City of Bridgeport and the N. Y., N. H. & H. R. R. Co.

(The agreement is not printed here, inasmuch as it is made a part of the applicant's application.) See Exhibit A, p. 3.

Common council meeting of April 20, 1896, City Clerk's Records, vol. 11, pages 19, 20.

"To the honorable common council of the city of Bridgeport.

GENTLEMEN: Under the provisions of a resolution of the General Assembly of the State of Connecticut, providing for the abolition of grade crossings in Bridgeport, approved June 22, 1895, Frank E. Clark, William E. Seeley and Frederick S. Stevens were appointed agents on behalf of the city of Bridgeport to enter into an agree-

ment with the New York, New Haven and Hartford Railroad Company, and we respectfully report that on the 21st day of December, 1895, we executed, on behalf of the city of Bridgeport, an agreement with the New York, New Haven and Hartford Railroad Company in relation to the matters mentioned in said resolution of the General Assembly, a copy of which agreement is herewith submitted.

(Signed) FRANK E. CLARK.
WILLIAM E. SEELEY.
FREDERICK S. STEVENS."

Common council meeting of May 4, 1896, City Clerk's Records, vol. 11, pages 50, 51.

"The city attorney reported as follows:

"'To the common council of the city of Bridgeport.

GENTLEMEN: Inasmuch as several of the members of your honorable body have this day called on me in reference to the injunction suit which was recently brought against the various members of your honorable body, and his honor the mayor, restraining you from taking any action on the railroad agreement, I deemed
24 it advisable to ask your honorable body for instructions before proceeding to lay out any line of action in reference to this suit. It is unnecessary for me to relate to you the history of the various negotiations between the city and the railroad company, and which culminated in the so called agreement made between the city, acting through F. E. Clark, F. S. Stevens and W. E. Seeley, who were appointed by the legislature, and the railroad company. This injunction purports to restrain your honorable body from fulfilling the terms of the agreement on behalf of the city because such an agreement is unconstitutional and illegal. In view of the fact that your honorable body has not yet taken any action on the report of the above-named committee, I felt that it might be presumptuous on my part to have anticipated that you would have accepted their report and ratified the agreement, and I therefore await your action. If you would not have ratified this agreement, but, on the other hand, would have rejected and repudiated it, of course we should construe such action to mean that you would be willing to have the injunction stand. While this injunction is pending, your honorable body cannot take any action on the report, but you can instruct me whether you desire to have the injunction stand, or an effort made to have it dissolved. I have also been informed that the railroad company have made a demand upon the city treasurer for $6,800 as the city's share of the cost of the work so far performed under the agreement, consequently there is but little doubt that the matter will reach the courts of adjudication soon. I would recommend the passage of the accompanying resolution.

Yours very respectfully, J. D. TOOMEY,
City Attorney.'

"'Resolved, That the city attorney be, and he is hereby instructed to take such legal steps in reference to any suits brought either to

restrain or enforce an agreement between the New York, New Haven & Hartford Railroad Company and the city of Bridgeport, as will protect the interests of said city, and dissolve the injunction brought by Frank J. Mooney against the mayor and aldermen of the city of Bridgeport; and he is hereby authorized and empowered to employ such assistance in said suits as to him may seem necessary.'"

(Referred to the committee on miscellaneous matters.)

Common council meeting of May 4, 1896, City Clerk's Records, vol. 11, p. 52.

"Resolved, That the city attorney is hereby requested to render an opinion to the miscellaneous committee in behalf of this council what action, if any, may be lawfully taken by this council in the payment of money demands made upon the city by the N. Y., N. H. & H. R. R. Co., relative to the elimination of grade crossings within the city limits."

(Referred to the miscellaneous committee.)

Common council meeting of May 18, 1896, city clerk's records, vol. 11, pages 57, 58.

"The following petition was received from F. Luzon and referred to the committee on miscellaneous matters:

'To the honorable common council of the city of Bridgeport.

GENTLEMEN: Whereas, a serious question having arisen as to the constitutionality of a special act of the legislature of the State of Connecticut, whereby the city of Bridgeport, under and in accordance with its provisions, has entered into an agreement or compact with the N. Y., N. H. & H. R. R. Co. to pay a sum of money equal to a one-sixth part of the expense necessary to the elimination of grade crossings within the corporate limits of said Bridgeport; and whereas, the city of Bridgeport having been legally enjoined by one of its citizens and tax-payers, Frank J. Mooney, Esq., from consummating or carrying out any and all of the provisions of the agreement or compact as aforesaid; and whereas, in consideration of the vast amount of debt and onerous rate of taxation that must necessarily be entailed upon the tax-payers of Bridgeport for many years to come as a result of the consummation of said compact or agreement; be it and it is hereby resolved, that a committee of three aldermen to consist of Messrs. N. J. Phelan, Sidney W. Challenger and David J. O'Rourke, be appointed to confer with the N. Y., N. H. & H. R. R. Co. for the purpose of securing a remission or annulment of all agreements or compacts at present existing between the New York, New Haven & Hartford Railroad Company and the city of Bridgeport in relation to the elimination of grade crossings as aforesaid, and also that the railroad company be requested to proceed at once in the prosecution of the work in hand under the direction of the honorable board of railroad commissioners, and in accordance with the statute law appertaining thereto.'"

(Referred to the committee on miscellaneous matters.)

Common council meeting of May 18, 1896, city clerk's records, vol. 11, p. 69.

"The committee on miscellaneous matters respectfully beg leave to report that the communication from the city attorney in reference to the injunction proceedings brought against the
26 mayor and aldermen of the city of Bridgeport be accepted, and your committee recommend the adoption of the following resolution as a substitute for the resolution accompanying said communication. Resolved, that the city attorney be and he is hereby authorized to take such action as will secure the dissolution of the injunction brought by Frank J. Mooney against the mayor and aldermen of the city of Bridgeport, and he is hereby authorized and empowered to employ such assistance in said suit as he may deem necessary."

"To the honorable common council of the city of Bridgeport:

The undersigned, a minority of the committee on miscellaneous matters to which was referred a communication of the city attorney with accompanying resolution relating to the employing of counsel to assist him in moving to dissolve the injunction now in force against this board, would most respectfully beg leave to report that they have carefully examined the same and believe that it is not for the best interests of the city that any action should be taken in the direction indicated. In arriving at this conclusion the undersigned have been governed by two important considerations. In the first place, there is a question in our minds whether the members of the board of alderman have the right to employ counsel at the city's expense to take action in a legal controversy which is directed against the mayor and each individual alderman. It is the opinion of a large number of our citizens that the mayor, or any of the aldermen, can only employ counsel for the purpose of moving to dissolve this injunction at their own expense. If this opinion is worth anything, then any attempt to fasten upon the city any such expense would not only be illegal, but contrary to that duty which we, as the chosen representatives of the people, have sworn to perform. In the second place, we are strongly convinced that any action on the part of this common council which could in any way be interpreted as approving of the so-called agreement made by Frank E. Clark, William E. Seeley, and Frederick S. Stevens, as a committee appointed by act of the General Assembly, with the N. Y., N. H. & H. R. R. Co., for the purpose of building a four-track road through this city, and incidentally to abolish grade crossings, would not only be unwise at this time, but contrary to the business principles, which, as careful custodians of the rights of the tax-payers, we should ever seek to introduce into the management of municipal matters. The injunction, which this resolution introduced by the city attorney at the request of certain members of this body proposes to move to dissolve, is brought in the interest of the city, and it will be fought to the courts of last
27 resort without costing the tax-payers a single cent. If the principle which is represented in this injunction is sustained

the burden which it is proposed to fasten upon the tax-payers, and which will fall with crushing force on the smaller ones, who are least able to bear it, will be dispelled. It would seem under such conditions the part of wisdom for this common council to take no affirmative action whatsoever in the matter until the courts have passed upon the legality of the so-called act of agreement. The undersigned would, therefore, recommend the adoption of the following resolution: Resolved that the consideration of the whole matter be indefinitely postponed."

(Minority report of the committee on miscellaneous matters)

"Alderman Holzer moved the adoption of the majority report. Alderman Phelan moved as an amendment that the minority report of the committee be substituted for the majority report. Alderman Challenger requested that the vote when taken be by yeas and nays. The following is the vote as taken to substitute the minority report for the majority. Yeas: Aldermen Thompson, Phelan, O'Rourke, Hincks, Northrop, Ruggles, Challenger and Burritt, 8. Nays: Aldermen Lasher, Lyons, Clampett, Seeley, Curtis, Windsor, Downer, Adams, Baker, Holzer and Grippin, 11. Absent: Alderman Thomas. Motion declared lost. Alderman Phelan then moved that the majority report as read be laid upon the table. Motion lost. The majority report was then adopted by the following vote, Alderman Phelan first voting in the negative and then requesting, before the result of the ballot was declared, that he be permitted to change his vote to the affirmative for the purpose of reconsideration at the next meeting. Yeas: Alderman Lashar, Phelan, Lyons, Clampitt, Seeley, Curtis, Windsor, Downer, Adams, Baker, Holzer and Grippin, 12. Nays: Aldermen Thompson, Hincks, O'Rourke, Northrop, Ruggles, Challenger and Burritt, 7. Absent: Alderman Thomas."

Common council meeting of May 18, 1896, city clerk's records, vol. 11, pages —.

"The following communication was received from H. G. Schofield and referred to the committee on miscellaneous matters:

"To the honorable board of aldermen of the city of Bridgeport:

Much has been said and a great variety of opinion expressed in relation to the question of the abolition of grade crossings in
28 this city, more particularly in regard to the methods and to the cost to the city under the agreement made by the committee named in the legislative act, and the New York, New Haven & Hartford Railroad Co. It is safe to assume that the general public as well as the officials of the railroad company, desires the elimination of crossings at grade, and that this matter cannot be long delayed. It is well known that the company presented and persistently urged a plan which would have met all the requirements equally well and at a cost vastly less; but their plan not only involved, but made absolutely necessary, the closing of several of our most important thoroughfares. It will be readily seen that in a

substantially level city when the crossings are near together, that whatever plan of crossing be adopted at one street, whether over or under, the same plan must be applied to the next, and so on, as it would require the length of several blocks to make possible the change from an over to an under grade crossing, and all intermediate streets must of necessity be closed. The company proposed a depressed grade from Fairfield avenue easterly to Park avenue, passing under that avenue as at present, except they wished to raise this bridge 6 feet. From this point easterly they proposed by the use of a heavy grade to be sufficiently high at Lafayette street to provide for an under-grade crossing of the highway. Beginning at the West End their plan would close Hancock avenue, or result in enormous damage to the organ factory and to the steel works opposite, by reason of a fill extending back several hundred feet between these buildings, made necessary as an approach to the highway bridge. The same difficulty would exist at South avenue, only in a more aggravated form, doing an almost irreparable injury to the property of the Malleable Iron Co., saying nothing *to* the inconvenience to the general public caused by the circuitous ways and steep grades of getting onto *to* the bridges at the few remaining crossings. Then crossing to the east of Park Ave., it is evident that Myrtle Ave. and Warren St., two very important thoroughfares, must of necessity be closed. Now this is the plan which the company still desires and in the case of the failure of this agreement, it is the plan with which the company will go before the railroad commissioners, or to the next legislature, for approval, and do we wish to risk the result? There seems to be an impression abroad that under this agreement we are called upon to contribute to the betterment of the road. This is a mistake. Their plan furnishes all the facilities they desire for the proper performance of their business, and at the same time does away with the crossings at grade. The amount named in the agreement to be paid by
29 the city is not for the benefit of this company, but is in part payment of the additional expense forced upon the company by the requirements and demands made by the committee, and, as many believe, in the interest of the city.

These requirements are the maintenance of all existing highways, the construction and maintenance of sidings at the West End for the accommodation of present and prospective interests in that locality, the construction of a siding and maintenance of the same in East Bridgeport; thus continuing the facilities for business so long enjoyed, the latter point being a special concession on the part of the company, they believing that East Bridgeport would be reasonably accommodated by their proposed freight yard located east of Chapel street. These changes from the original plan provided for in this agreement will cost the company a sum largely in excess of the amount of the city's share of the expense. The increased cost in one section alone, that lying between Park avenue and Fairfield avenue, will exceed $250,000. To properly weigh the advantages gained to the city by this agreement we should look beyond the injury and inconvenience of the present,

and consider its bearing upon our future growth and prosperity, remembering that this change is for all time. Much stress is laid by the opponents of this agreement upon the fact that it provides for the payment by the city of one sixth part of the cost of land taken or required to carry this plan into effect. Now the amount to be paid by the city cannot exceed the fixed and definite sum named in the agreement, and it makes little difference whether it be applied to the payment for land taken or to construction account, or for any other purposes whatsoever; the only question being whether in paying this amount we receive an equivalent in the way of advantages over and above what we would reasonably expect to obtain at the hands of the railroad commissioners under the general law, or from the next legislature, for the grade crossing must go. We have now before us a definite plan for the work, and a fixed time in which it is to be completed. We have been for a long time swamped in uncertainty as to future movements; business interests have suffered and must continue to suffer with the prolongation of this uncertainty. One of the speakers at the miscellaneous committee last Thursday evening, referring to the proposition, to authorize the city attorney to take steps for the dissolution of the injunction, characterized such proceedings as anomalous on the ground that such action was against the interests of the city. Now there are many who believe that the best interests of the city require the removal of the injunction, and if the city attorny can aid to this result, he should not lack the authority.

H. G. SCOFIELD."

Common council meeting of May 29, 1896, city clerk's records, vol. 11, p. 84.

"At this time, Alderman Phelan, in accordance with notice given at last meeting, moved a reconsideration of the vote adopting the majority report of the committee on miscellaneous matters relative to taking steps for the dissolution of the injunction against the mayor and aldermen in relation to abolition of grade crossings. After a lengthy explanation of his position he withdrew his motion."

Common council meeting of June 1, 1896, city clerk's records, vol. 11, p. 90.

Message of Mayor Clark.

"The railroad question has progressed one stage during the year. The special committee appointed by the General Assembly to make an agreement for and in behalf of the city with the railroad company, has performed its work. The agreement provides for an elimination of grade crossings by an elevated structure through the city, an elevated station and a drawbridge, the city to pay to the company one-sixth of the cost exclusive of the station, the total cost to the city not to exceed $400,000 in any event. Recognizing

the fact that Bridgeport is a manufacturing city, the agreement provides for sidings for the proper accommodation of our manufacturers. However the matter may be looked at from the various standpoints from which it may be viewed or considered, it is my candid opinion and belief that the terms of the agreement are the best that the committee could secure, and are, all things considered, not unfair to the city. The additional expense of $100,000 to the city is, in my judgment, more than offset by the substitution of an elevated for a depressed structure as planned by the company, and the special freight facilities afforded to our manufacturers. So far as I can gauge public sentiment, it strongly favors the consummation of the agreement entered into between the railroad company and the committee. I have no hesitation in saying that I would regard it as a public misfortune to block the completion of the project by legal proceedings now when the work has been fairly begun. I prefer the carrying out of the terms of the contract with its resulting expense to the city, to prolonged litigation with its attendant delays and uncertainty. Taken as a whole, and giving due weight to all argument advanced in opposition, I be-
31-45 lieve that our city's true interest will be subserved by the consummation of the agreement, settling now and forever the railroad problem."

(Accepted and ordered printed in the proceedings and year book.)

City Clerk's Records, vol. 10, p. 36.

Doings of the railroad commissioners of the State of Connecticut relative to an agreement between the city of Bridgeport and the N. Y., N. H. & H. R. R. Co.

(This report is not printed, inasmuch as it appears in the *appears in the* applicant's application as Exhibits A and B.)

The foregoing evidence is the votes and resolutions and minutes of the common council of the city of Bridgeport, read on the trial of said cause, and comprises all such votes, minutes and resolutions so read.

Oct. 20, 1899.

R. WHEELER, *Judge.*

(Filed Oct. 20, 1899.

WM. R. SHELTON, *Clerk.*)

* * * * * * *

46

N. Y., N. H. & H. R. R. Co. vs. Wheeler & Howes. } Before the Hon. Ralph Wheeler, a Judge of the Superior Court, Sitting at Bridgeport, in Fairfield County, October 11, 1899.

Defendants' Appeal.

In the above-entitled cause the defendants appeal from the judgment and decision of said judge, to the supreme court of errors, at its session to be held at Bridgeport, in Fairfield county, in and for the third judicial district, on the fourth Tuesday of October, 1899, for the revision of the errors which they claim to have occurred in the trial thereof, and for reasons of said appeal assign the following, in relation to which they claim that said judge erred and mistook the law:

I.

Errors Apparent on the Face of the Trial Record.

1. In overruling the defendants' demurrer to the plaintiff's amended application, said amendment being the additions of and annexing to the application of Exhibits A and B.

2. In granting the plaintiff's motion to strike out the second defense in the answer to said amended application.

II.

Errors in the Conduct of the Trial to the Judge.

1. In admitting the evidence offered by the plaintiff as regards its purchase of land subsequent to the execution of the agreement referred to in the application, as stated in the finding in par. 10 thereof.

2. In admitting the minutes and records of the action of the common council, as stated in pars. 3, 4, 5 and 6 of the finding, notwithstanding the defendants' objections thereto, as stated in the finding, in par. 12 thereof.

3. In overruling the defendants' claims of law that, upon the facts appearing in evidence, the applicant had no right to condemn the land in question in the manner proposed by said application, and that said application should be dismissed, as stated in par. 13 of the finding.

4. In overruling the defendants' first claim of law, as stated in par. 13 of said finding.

47 5. In overruling their second claim of law as so stated.

6. In overruling their third claim of law as so stated

7. In overruling their fourth claim of law as so stated.

8. In overruling their fifth claim of law as so stated.

9. In overruling their sixth claim of law as so stated.

10. The defendants further claim that the finding should be corrected in accordance with exceptions 1, 2, and 3 respectively.

They therefore pray for such relief as is provided by law in the premises.

Bridgeport, October 11, 1899.

JOHN M. WHEELER AND
WILLIAM T. HOWES,
Defendants,
By DE FOREST & KLEIN AND
PAIGE & CARROLL,
Their Attorneys.

I certify the foregoing appeal was filed on the 11th day of October, 1899, and George P. Carroll, of Bridgeport, is recognized in the sum of fifty dollars, conditioned that said Wheeler & Howes, defendants, shall prosecute said appeal to effect, and pay all costs therein if they shall fail so to do; and said appeal is hereby allowed.

RALPH WHEELER,
Judge of Superior Court.

(Filed Oct. 13, 1898.

WM. R. SHELTON, *Clerk.*)

Superior Court, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said superior court.

Attest: WM. R. SHELTON, *Clerk.*

Supreme Court of Errors, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court of errors.

Attest: WM. R. SHELTON, *Clerk.*

48 At a Supreme Court of Errors in the Third Judicial District, Holden at Bridgeport on the Fourth Tuesday of October, 1899.

In the Matter of the Application of the New York, New Haven and Hartford Railroad Company *vs.* JOHN M. WHEELER and WILLIAM T. HOWES, Both of Bridgeport, Conn.	No. 9. On Appeal from the Hon. Ralph Wheeler, a Judge of the Superior Court, January 2, 1900.

This appeal by the defendants, claiming error in the process, record, and judgment and in the proceedings and decisions of the Hon. Ralph Wheeler, a judge of the superior court, on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this court, was allowed by the Hon. Ralph Wheeler and by the superior court for Fairfield county on the 11th day of October, 1899, and came to this court at its ses-

sion at Bridgeport on the fourth Tuesday of October, 1899, and thence by continuance to the present time, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment, and proceedings there is no error.

49 It is therefore considered and adjudged that there is no error, and that the appellee recover of the appellant- $— costs.

By the court:

WM. R. SHELTON, *Clerk.*

50 [Endorsed:] No. 9. In the matter of the application of the New York, New Haven and Hartford Railroad Company *vs.* John M. Wheeler and William T. Howes, both of Bridgeport, Conn. Supreme court of errors, third judicial district, Fairfield county, October term, 1899. Judgment.

51 Supreme Court of Errors, Third Judicial District, Bridgeport, October Term, 1899.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
v.
JOHN M. WHEELER ET AL.

Argued Nov. 2d, 1899; decided Jan. 2d, 1900.

HALL, *J.*:

This is an application by the New York, New Haven and Hartford Railroad Company to a judge of the superior court, under section 3464 of the General Statutes, for the appointment of appraisers to estimate the damages from the taking of certain real estate belonging to the defendants.

By the terms of the statute any railroad company is entitled to have such appraisers appointed upon proof that it has the right to take the land in question for railroad purposes, and that it cannot obtain it by agreement with the parties interested therein.

The defendants object to the appointment of appraisers upon the grounds that the plaintiff has no right to take this property, and that it is not unable to obtain it by agreement with the owners.

The reasons of the defendants' claim that the railroad company has no right to take the land in question are fully set forth in the demurrer to the application and in the claims made by the defendants upon the trial of the issue raised by the first defense.

Stated generally, their claim upon this point is that no
52 valid order for the performance of the work in question has been made:

First. Because the agreement entered into under section 2 of the special act of 1895 (Special Laws of 1895, p. 416) made a part of the plaintiff's application, and which provides for the construction of a four-track railroad over the defendant's land, according to plans made a part thereof, and for the apportionment of the expense between the city of Bridgeport and the railroad company, as

therein stated, was neither executed nor ratified by the city of Bridgeport nor presented by the city to the railroad commissioners for approval as intended by the act.

Second. If the agreement was executed in the manner contemplated by the act, because the provision in said agreement or order apportioning the cost of the work between the railroad company and the city, and imposing upon the latter the burden of paying a one-sixth part, not exceeding $400,000 of the entire cost of constructing a four-track elevated railroad through the city of Bridgeport, in place of the existing double-track road, is in contravention of the 25th amendment of the State constitution and of section 1 of the 14th amendment of the Constitution of the United States, and that therefore said agreement and order and the special act under which they were made are void and confer no authority upon the railroad company to perform the work in question or to take the defendants' property by this proceeding.

53 Regarding the first reason of the defendants' claim, we are of opinion that the failure of the city of Bridgeport to take any action, either by resolution of its common council or by vote of its citizens, to authorize the execution of the agreement, Exhibit A, or to ratify it after its execution by the railroad company and by the individuals named in section 2 of the act of 1895, or to request its approval by the board of railroad commissioners, furnishes no reason why the railroad company may not and should not proceed with the work of constructing the four-track railroad through the city of Bridgeport in accordance with the plans embraced in the agreement and of removing the dangerous grade crossings, as ordered by the railroad commissioners, nor why the railroad company may not, upon payment of just compensation, take the defendants' land for that purpose.

Section 2 of the act appoints three persons to act for the city for the purpose of making said agreement. It does not provide that it shall be executed or approved by any other persons or body acting in behalf of the city, nor that the city must join with the railroad company in requesting its approval by the railroad commissioners. We do not think the act contemplated that the city should appoint agents to execute the agreement, or that after its execution it should be ratified or approved by the common council of Bridgeport before it could become effective as a part of the commissioners'

54 order, or that the city should request its approval by the commissioners before the latter could approve it.

Neither the right of the railroad company to construct a four-track road in accordance with the proposed plans nor the power of the legislature or of its agents, the railroad commissioners, to order the removal of the grade crossings in that manner depends upon the consent of the city.

By the special act of 1895 the legislature expressly commanded that all crossings at grade over the main tracks of the New York, New Haven and Hartford Railroad Company in the city of Bridgeport should be abolished. To carry out that purpose, and at the same time to enable the railroad company to complete its four-track sys-

tem between New York and New Haven by constructing two additional main tracks through Bridgeport, so that they should not cross any highway at grade, it empowered the railroad commissioners to determine and direct by what plans and methods these objects should be accomplished, and also to apportion the expense.

For the purpose of facilitating the performance by the railroad commissioners of the duty thus imposed, it empowered them, in ordering the performance of this work, to approve and adopt such plan of construction, as well as such apportionment of the expense of the removal of the grade crossings by that plan, as might be agreed upon within six months by the railroad company and the mayor and two other citizens of Bridgeport appointed to act for the city.

55 Section 4 directed the commissioners to determine themselves the plans and methods of performing this work in case the agreement provided for in section 2 should not have been made. If the act intended that the agreement described in section 2 should either be executed by agents appointed by the city, or in some manner adopted or ratified by the city, after its execution by the three persons named by the legislature, then the agreement provided for by the act not having been made, the commissioners were fully authorized by section 4 to adopt as their own the plans of construction described in the so called agreement, and upon the application of the railroad company as made in December, 1895, and after the public hearing had in January, 1896, to order the work executed according to those plans, and this they expressly did by their order made January 23d, 1896, more than six months after the passage of the special act.

But, as before suggested, we think that the agreement entered into by the railroad company and the three persons who acted in behalf of the city was executed as the act intended. It has been duly approved by the commissioners and has thereby, by the terms of the second section of the act, become an order of the railroad commissioners issued by authority of the State, and obedience to which may be compelled by mandamus. Mooney *v.* Clark, 69 Conn., 241, 254; Wheeler *et al. v.* New York, N. H. & H. R. Co., 71 Conn., 270, 279. That the legislature has the power

56 through the railroad commissioners to compel the removal of these grade crossings in this manner, and the payment of the expense of such removal, either by the railroad company or the city, or by both, cannot be questioned. Woodruff *v.* Catlin, 54 Conn., 277, 295; New York & N. E. R. Co. *v.* Bristol, 151 U. S., 556; Mooney *v.* Clark, *supra.*

The order of the railroad commissioners having been thus made, section 8 of the act empowers the plaintiff to take any land which it "shall deem necessary properly to carry out said work in any and all particulars * * * in the same manner as is now provided by statute for taking land for railroad purposes." The railroad company, proceeding in the manner required by section 3464 of the General Statutes, voted to take the defendants' land for the purpose of changing the radius of its curves and for additional

tracks, as stated in the resolution of its board of directors, and such taking was duly approved by the action of the railroad commissioners taken June 30th, 1897. The act of 1895 therefore gives to the plaintiff company the right, upon the payment of due compensation, to take the defendants' land for the railroad purposes described in said resolution, unless the provisions of section 8 are rendered ineffective because some other parts of the act or of the agreement or order made in pursuance of it conflict with the constitution of this State or of the United States, as claimed by the defendants.

57 The necessity and propriety of the taking this land by the plaintiff for railroad purposes is conclusively settled by the vote of the railroad company to take it, and the action of the railroad commissioners of June 30th, 1897, approving such taking. Cockeroft's Appeal, 60 Conn., 161.

The taking of land for the railroad purposes described in the vote of the board of directors of the company is a taking of land for a public use, and a law which makes the decision of the railroad company and of the commissioners final upon the question of the necessity and propriety of taking certain land for such railroad purposes is not for that reason unconstitutional. New York, N. H. & H. R. Co. *v.* Long, 69 Conn., 424, 435.

This is not a proceeding in which the owner of property sought to be condemned attempts to show that it was not in fact taken for a public use. That the land is to be used by the railroad company for the purposes named in the vote of its directors in the construction of a four-track railroad is not questioned. The contention of the defendants is that it is to be used either wholly or in part for railroad purposes, which are not germane to the work of removing grade crossings. Whether taken merely to enable the railroad company to straighten its lines and construct additional tracks or taken only for the purpose of constructing a railroad so as to avoid crossings, the taking is in either case for railroad purposes, and is a taking for a public use. New York, N. H. & H. R. Co. *v.* Long, *supra.*

58 Since the commissioners had authority, without the consent of the city, to order this work to be performed, according to the plans adopted, and have so directed it to be done, and since the necessity and propriety of taking the land in question for railroad purposes has been finally determined, can the defendants, by questioning in this proceeding the validity of the apportionment between the city and the railroad company of the expense of the removal of the grade crossings, prevent the plaintiff from constructing, in accordance with those plans, the four-track railroad through the city which its business requires, and from removing the grade crossings in the manner ordered?

Sections 2 and 12 of the special act provide that the railroad commissioners, either by approving the agreement made under section 2 as to the amount to be paid by the city or, in case no such agreement shall have been made, by fixing the amount themselves after the work shall have been performed, shall direct what proportion

of the entire expense of removing the grade crossings in the manner ordered shall be paid by the city of Bridgeport.

Pursuant to these provisions the commissioners, by approving the agreement, have ordered that the city shall pay a one-sixth part, not exceeding $400,000, of the entire expense of constructing the road in accordance with the plans.

59 The defendants contend that by this agreement and order and by the plans made a part thereof the city will not only be required to pay a part of the cost of elevating the existing double track above the highways, but also to contribute to the payment of the expense incurred by the railroad company in taking land and building a drawbridge and doing other acts for the purpose of constructing two additional elevated tracks not necessary to the work of eliminating grade crossings. It is argued that the act and the agreement and order imposing such an obligation upon the city violates that provision of the State constitution which forbids any municipality from making any donation to a railroad corporation, and of the Constitution of the United States, which forbids the State from depriving any person of property without due process of law; that therefore the order of the commissioners made under this act, permitting the railroad company to construct its four-track road and requiring it to proceed with the work of the removal of the grade crossings, is invalid, and that the railroad company cannot under this order or under this act condemn the defendants' land.

If the railroad company desires to take this property as one step in carrying out the proposed plan, the defendants cannot prevent it upon the ground that the company may not afterwards be able to obtain reimbursement from the city. The ability of the

60 defendants to obtain payment of their damages does not depend upon the right of the railroad company to collect a part of it from the city. Before taking the land, the company must compensate the defendants.

Even if this proceeding could be regarded as one in which the judgment appointing appraisers established to some extent the liability of the city to pay its proportionate part of the expense, as fixed by the agreement and order, and in which the city or its tax-payers might properly make the claim that the apportionment of the expense was unlawful, such a defense would not be open to these defendants upon the facts before us. By the pleadings the defendants are simply owners of the property sought to be taken. They have not alleged that they are tax payers, or that they have any right or authority to represent the city or its tax-payers in this proceeding, or that they will be injured in any respect from the payment by the city of its part of the expense of the work as fixed by the agreement and order.

But the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property does not depend upon the obligation of the city to pay a one-sixth

part of the expense of the whole, or of any portion of the work of this undertaking.

61 The two purposes of the act of 1895 were, first, the removal of all existing grade crossings in Bridgeport and the construction in the most feasible manner, after considering the interest of the public, the rights, responsibilities, and duties of the railroad company, and of the city, and the rights of other parties concerned, of a four-track railroad through the city in such a way as to avoid crossing any highway at grade; and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners nor the power of the commissioners to compel its performance depends upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made, as authorized by section 2, the commissioners, after the work shall have been completed, shall apportion the entire expense among the proper parties.

We may add that the right of the railroad company to condemn the defendants' property does not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897, both of which are alleged

62 in this application, the railroad company is entitled under section 3464 of the General Statutes to take the land for the uses named in the resolution.

Without intending to imply that the agreement and order fixing the proportionate part of the entire expense of this work to be paid by the city is of doubtful validity, we refrain from further discussion of the subject, as we think the question is one which cannot properly be raised in this proceeding.

The question of the inability of the plaintiff to obtain the land from the defendants by agreement was one of fact, upon which the interview described in paragraphs 17 and 18 of the defendants' proposed finding was relevant evidence. Even though by a correction of the finding it should be made to appear that that was all the evidence upon the subject, we could not review the conclusion of the judge upon that question.

The defendants are not entitled to the other corrections of the finding asked for, since the record before us contains all the facts necessary for the presentation of the questions of law raised at the trial.

As the plaintiff was entitled to have appraisers appointed without having shown that the agreement in question was executed or ratified by the city, neither the rulings of the judge admitting evidence to prove those facts nor his findings from such evidence worked any harm to the defendants.

63 There was no error in striking out the second defense. It was not a proper special defense, and there was no reasonable

ground for pleading it as such. It was merely a repetition of averments contained in the demurrer, and therefore, by the defendants' admission, was no more than a statement of facts appearing in the application, and of claims of law made in the demurrer. By the demurrer and by the first defense the defendants had the full benefit of all claims of law and fact made by the second defense.

There is no error.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES PH——MRS, *Reporter.*

64 STATE OF CONNECTICUT, } *County of Fairfield,* } *ss.:*

I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut within and for the third judicial district and keeper of the seal thereof, hereby certify that the above and foregoing, together with the copies of certain plans marked "N. Y., N. H. & H. R. R. Co. *vs.* Wheeler & Howes, Plaintiffs' Ex. B, Defendants' Ex. 102," and certified to by me as a part of the record in this case, is a true copy of the record and of all proceedings in the cause of The New York, New Haven and Hartford Railroad Company *vs.* John M. Wheeler and William T. Howes.

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said county and State, this 20th day of February, 1900.

WM. R. SHELTON, *Clerk.*

Endorsed on cover: File No., 17,648. Connecticut supreme court of errors. Term No., 534. John M. Wheeler and William T. Howes, plaintiffs in error, *vs.* The New York, New Haven and Hartford Railroad Company. Filed February 21st, 1900.

In the

Supreme

JOHN M.

Plaintiffs in Error,

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Motion of Defendant in Error to Dismiss and Affirm.

ROBERT E. DeFOREST,
GEORGE F. CARROLL,

of Counsel for Plaintiffs in Error.

Address, Bridgeport, Conn.

S. M. Quintard, Printer, Main corner, Bridgeport.

Supreme Court of the United States,

October Term, 1899.

JOHN M. WHEELER and WILLIAM T. HOWES
vs.
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

No. 534.

BRIEF FOR PLAINTIFFS IN ERROR

On Motion of Defendant in Error to Dismiss and Affirm.

STATEMENT.

The printed document purporting to be a "transcript of the record" is incomplete as a copy of the record actually certified to this Court by the Clerk of the Connecticut Supreme Court of Errors, and it does not fairly present the case so as to enable the plaintiffs in error by their brief to argue or sufficiently to indicate the federal question that they believe to be involved.

On page 9 of the transcript appears an application by the Railroad Company, the defendant in error, addressed to a judge of the Superior Court of Connecticut for the appointment of appraisers to estimate the damages that will arise to Wheeler & Howes, the plaintiffs in error, from the taking of certain real estate belonging to them.

By paragraph 4 of the application (transcript, p. 9) it appears that a certain agreement referred to in paragraphs 1–3, and

certain plans referred to therein and made a part of said agreement, are made a part of the application as Exhibits A and B respectively.

Said Exhibit A is, indeed, printed in the record.

But said Exhibit B, consisting of the plans made a part of the agreement, is not printed as a part of the record. See Transcript, p. 14.

Now these plans, taken in conjunction with the agreements, being Exhibits A and B, present the points of the case essential to raise the Federal question.

These plans were duly certified up to this Court by the clerk of the Connecticut Supreme Court of Errors and are an integral part of the record in this case.

From these plans it appears as matter of law that the land of the Wheeler & Howes is neither needed nor wanted by the Railroad Company for the purpose of eliminating any crossings at grade of its railroad tracks over highways, and that the allegation in the application that said land was wanted for that purpose is absolutely false and untrue.

The facts are, as appears from an inspection of Exhibits A and B, that three persons, authorized by the Legislature to make an agreement in behalf of the City of Bridgeport with the Railroad Company, for the purpose of eliminating grade crossings in Bridgeport and of determining what proportion, if any, of the expense of so doing should be borne by the city, did sign an agreement with the Railroad Company in which the Railroad Company agreed to do certain work whereby its tracks should be separated from the grade of the intersecting streets, but whereby certain other work should be done by the Railroad Company *not necessary or germane to such grade crossing elimination, and whereby the City of Bridgeport should pay a large portion of the expense of such entire work, both germane*

and non-germane to the work of grade crossing elimination. It further appears from said plans that the land of Wheeler & Howes is wanted *for the carrying out of a part of the work agreed upon that is not necessary or germane to the work of grade crossing elimination.*

The particular features of the work to be done and for which the city was to contribute that are not necessary or germane to the work of grade crossing elimination. are set forth in the second and eighth reasons of demurrer of Wheeler & Howes to the application of the Railroad Company, and may be summarized as follows:

a. A part of the expense of building an elevated structure for two extra tracks on a part of the present right of way.

b. A part of the expense of acquiring land for the purposes set out in the resolution passed by the Railroad Company's board of directors and nakedly set out in par. 5 of the application.

c. Particularly a part of the expense of acquiring land for the purpose of lessening the radius of the curves in the Company's railroad, which land in part, will be that described in par. 6 of the application and belonging to Wheeler & Howes.

d. A part of the expense of building a four track drawbridge between two pieces of land outside of the present layout and as an incident of such change of layout.

e. A part of the expense of building an elevated structure for four tracks on the outside land so acquired and to be acquired.

f. A part of the expense of building a spur track at grade with present highways.

It is also duly claimed in the demurrer that the taking of the land of Wheeler & Howes under those circumstances will be

contrary to the provisions of the 25th Amendment to the Constitution of Connecticut and to Sec. 1 of the 14th Amendment of the Federal Constitution. See transcript, pp. 18 and 19.

The part of the XXVth Amendment here material reads as follows:

"No County, City, Town, Borough, or other municipality, shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of any such corporation."

Under Connecticut practice this assignment of constitutional questions in the demurrer was sufficiently explicit to permit of argument and to compel an adjudication thereon. This is so conceded in the opinion of the Connecticut Court. We mention the point for the sake of avoiding any misapprehension.

This demurrer was overruled by the trial judge, (transcript, p. 19).

Wheeler & Howes then filed their answer, one defense being substantially a general denial and the other being a special defense setting up as allegations of fact the same matters that were set forth in the demurrer as allegations of law. This course was pursued since it was feared that the State court might hold these facts did not appear ar conclusions of law, but were only averable as allegations of fact.

The Connecticut Court held, however, that these matters were correctly stated as allegations of law and that Wheeler & Howes were correct in their interpretation of the agreement and plans, and therefore the second defense was unnecessary. See the fourth paragraph and also the last full paragraph of Judge Hall's opinion announcing the decision of the Connecticut Supreme Court of Errors, (transcript, pp. 36, 41 and 42).

Wheeler & Howes again made—and adequately made—the

same claims of constitutional law upon the trial of the issue of fact raised by their first defense, and were overruled. See transcript, pp. 22–24.

The Connecticut Court in Judge Hall's opinion nowhere contends that the constitutional questions, whether State or Federal, were not adequately raised before the trial judge; neither is it asserted that the adverse action of the trial judge was not sufficiently assigned as error so as to bring up the same questions before the Connecticut Supreme Court of Errors.

These claims of constitutional law and the facts upon which they are predicated are set forth appearing in the transcript on pp. 5–8, 18, and 24.

In the opinion it is said:

"The defendants object to the appointment of appraisers upon the grounds *that the plaintiff has no right to take this property.* * * * The reasons of the defendants' claim that the railroad company *has no right to take the land in question* are fully set forth in the demurrer to the application and in the claims made by the defendants upon the trial of the issue raised by the first defense.

* * * * * * *

"Second. If the agreement was executed in the manner contemplated by the act, because the provisions in said agreement or order, apportioning the cost of the work between the railroad company and the city, and imposing upon the latter the burden of paying a one-sixth part, not exceeding $400,000 of the entire cost of constructing a four-track elevated railroad through the city of Bridgeport, in place of the existing double track railroad, *is in contravention of the 25th amendment of the State constitution and of section 1 of the 14th amenement of the Constitution of the United States,* and that therefore said agreemeent and order and the special act under which they were made are void and confer no authority upon the railroad company to perform the work in question or *to take the defendants' property by this proceeding.*"

See transcript, pp. 36 and 37.

The above questions show conclusively that before the high-

est court of Connecticut, Wheeler & Howes claimed that to permit the Railroad Company to take "the land in question"—described as property of Wheeler & Howes on p. 10 of the transcript—would be a taking of their property without due process of law in contravention of section 1 of the 14th Federal Amendment.

And no inadequate statement in the opinion as to the process of Wheeler & Howes in arriving at such a conclusion as claimed by them can diminish the effect of such a claim. But attention should be called to the inaccuracy of the opinion in stating the reason of the claim made by Wheeler & Howes, as stated in their demurrer, (transcript, p. 18) and in argument at the trial, (transcript, p. 24). This inaccuracy is found on p. 37 of the transcript beginning with the word, "Second." The real claim of Wheeler & Howes, as appears by pp. 18 and 24 of the transcript, was that if *the project of the Railroad Company should be carried out as called for, the agreement with the city and the plans annexed thereto, the taking and condemnation of the property of the Wheeler & Howes would be contrary to the designated State and Federal Constitutional provisions and would be without due process of law.*

And the reason of this claim was, not that it was unconstitutional for the city of Bridgeport to pay for a part of the work for grade crossing elimination, but that, as stated explicitly in the demurrer and also in argument at the trial, *it would be contrary to the 25th Amendment to the State Constitution for the city to pay for the doing of work for the benefit of the Railroad Company, not necessary or germane to the work of grade crossing elimination, and therefore that, as the land of Wheeler & Howes was to be taken to carry out a part of the project, to be paid for in part by the city, not necessary or germane to the work of grade crossing elimination, their property would be taken without due process of law contrary to section 1 of the 14th Federal Amendment.*

Later on in the opinion the claim of Wheeler & Howes is stated with more correctness.

"This is not a proceeding in which the owner of property sought to be condemned attempts to show that it was not in fact ~~(sic)~~ taken for a public use. That the land is to be used by the Railroad Company for the purposes named in the vote of its directors in the construction of a four-track railroad is not questioned.

"The contention of the Railroad Company is that it (the land to be condemned) is to be used either wholly or in part for railroad purposes, which are not germane to the work of removing grade crossings." See transcript, p. 39.

Then the opinion, arguing that the land of Wheeler & Howes will be taken in accordance with due process, and deciding adversely to the constitutional claim now urged, proceeds as follows:

"Whether taken merely to enable the railroad company to straighten its lines and construct additional tracks or taken only for the purpose of constrncting a railroad so as to avoid crossings, the taking is in either case for railroad purposes, and it is a taking for public use * * * can the defendants, by questioning in this proceeding the validity of the apportionment between the city and the railroad company of the expense of the removal of the grade crossings, prevent the plaintiff from constructing, in accordance with these plans, the four-track railroad through the city which the business requires, and from removing the grade crossings in the manner ordered?"—Transcript, p. 39.

This last enunciation of the case is inaccurate. Instead of "questioning" in the manner stated, Wheeler & Howes contended that to take their property in furtherance of and as part and parcel of a scheme whereby the city should pay to a railroad company part of the expense of improving its railroad would be a taking of the same without due process of law.

Later on, however, the opinion states the matter more correctly:

"The defendants contend that by this agreement and order and by the plans made a part thereof the city will not only be

required to pay a part of the cost of elevating the existing double track above the highways, but also to contribute to the payment of the expense incurred by the railroad company in taking land and building a drawbridge and doing other acts for the purpose of constructing two additional elevated tracks not necessary to the work of eliminating grade crossings. It is argued that the act and the agreement and order imposing such an obligation upon the city violates that provision of the State constitution which forbids any municipality from making any donation to a railroad corporation, *and of the Constitution of the United States which forbids the State from depriving any person of property without due process of law;* that therefore the order of the commissioners made under this act, permitting the railroad company to construct its four-track road and requiring it to proceed with the work of the removal of the grade crossings, is invalid, *and that the railroad company cannot under this order or under this act condemn the defendants' land.*" Transcript p. 40.

The Court then refuses to decide whether the imposition of a portion of expense of doing the work, part of which is not necessary or germane to the work of grade crossing elimination is in violation of the 25th amendment of the State Constitution, but as the Court proceeds to argue, even if this is so, this circumstance does not make the taking of the property of Wheeler & Howes, a taking without due process of law.

Here, then, is a fair and square decision adverse to a claim made under the Federal Constitution.

Lastly, we desire to call attention to the railroad company's own profession of its purpose in taking the land of Wheeler & Howes is this:

"In order properly to carry out in any and all particulars, as called for in said plans, the work imposed upon said railroad company by said special Act and agreement and said order and finding of said railroad commissioners, said company deemed it necessary to take all those certain pieces and parcels of land as shown on said plans [including the property of Wheeler & Howes]. Transcript, p. 9, par. 5.

This purpose was found to be true by the trial judge. Transcript, p. 22.

BRIEF.

The motion proceeds upon the ground that there was not raised in the proceedings in the Superior and Supreme Court of the State of Connecticut, any question under the constitution of the United States, within the meaning of the Act of Congress determining the appellate jurisdiction of the Supreme Court of the United States.

The Act of Congress provides that "the Supreme Court of the United States shall have appellate jurisdiction in case of a final judgment or decree in any suit in the highest court of a State where, is drawn in question the validity of a statute of—or an authority exercised under, any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority."

The record shows that the plaintiffs in error are the owners of valuable real estate in the city of Bridgeport which they desire to keep for their own business purposes—and have refused to sell to the railroad company, and which the railroad company is attempting to deprive Wheeler & Howes of *in invitem*, by these condemnation proceedings.

These condemnation proceedings are a suit—an action at law—to be governed by the same general principles of justice and rules of practice, as apply to and regulate other actions.

By the well settled and invariable practice in Connecticut, when a party applies to the Court for the appointment of appraisers for the purpose of condemning another's land, the ap-

plicant is bound to show that he has a legal right so to condemn it, and the respondent, the owner of the land, is at liberty to show that the applicant has no such legal right.

If the applicant fails to show such legal right, or if the respondent shows that the applicant has no such legal right, the application must be dismissed.

The showing of that legal right necessarily requires allegations, on the part of the applicant, to which the respondent must demur or answer as the circumstances may require. If an issue of fact is raised, it must be disposed of by the Court upon the law and the evidence as in any other case.

As in any other case, the applicant must stand or fall upon his allegations and his proof. It is not competent for the Court to decide the case upon any other grounds.

If a constitutional question is presented by the allegations and the issues joined thereon—and the Court renders judgment for the applicant against the constitutional right claimed by the respondent upon those issues—the constitutional question cannot be avoided by any suggestions of the Court in its opinion, that the applicant *might have* proceeded in a different manner, and accomplished the *same* purpose in a *constitutional* way.

This, however, seems to us to be the extraordinary method adopted in this case to oust this Court of jurisdiction, and to deprive Wheeler & Howes of any hearing before this Court upon the one vital question, upon which they have made their whole contention, in all the preliminary stages of the controversy.

The railroad company, being the applicant in this matter, when it applied to the Superior Court Judge for the appointment of appraisers, was bound to show its right to condemn the land.

N. Y. &c. R. R. Co. v. Long, 69 Conn. 424.
Edwards v. Stonington Association, 20 Conn. 466.

Evergreen Cemetery Association, v. Beecher, 53 Conn. 551.
Westfield Cemetery Association v. Danielson, 62 Conn. 319.
Williams v. Elting Woolen Company, 33 Conn. 353.
Olmstead v. Camp, 33 Conn. 532.
Todd v. Austin, 34 Conn. 78.
Occum Co. v. Sprague Mfg. Co. 35 Conn. 496.
McArthur v. Morgan, 49 Conn. 347.
Geer v. Rockwell, 65 Conn. 316.

As the sole ground upon which it claimed the right, it set up in its application—

(1.) *A special Act of the legislature of the State of Connecticut.* (2.) A certain contract alleged to have been made between the city of Bridgeport and the applicant *under the provisions of, and by authority of said Act.* (3.) An application by the Railroad Company and the city of Bridgeport to the Railroad Commissioners for their approval of said agreement, *pursuant to the provisions of said Act.* (4.) An approval of said agreement, by said railroad commissioners upon said application so made *pursuant to the provisions* of said Act, and (5). A vote of the directors of the applicant railroad company to take the land here in question, in *order to carry out in any and all particulars as called for in said plans* (being a part of said agreement) the work imposed upon said railroad company by *said special Act and agreement* and said order and finding of said railroad commissioners.

All this appears from the application itself on pp. 9 and 10 of the record.

It appears, therefore, beyond all possible controversy or equivocation, that the only right alleged, shown, or attempted to be shown, by the railroad company here in its original application to the Judge for the appointment of these appraisers,

was an alleged right to condemn this land and take it under and by virtue of, and in pursuance of, and to carry out a certain special Act of the legislature of the State of Connecticut.

That is the ground, the sole ground, the whole ground of the action which the railroad company instituted against Wheeler & Howes, and which was tried before the Judge of the Superior Court and thereupon appealed to the Supreme Court of Errors of the State of Connecticut, and which Wheeler & Howes have brought to this Court upon this writ of error.

The entire proceeding was based upon that special Act of the legislature, and upon nothing else.

The respondents, Wheeler & Howes, in that proceeding demurred, upon the ground that the special Act in question and the pretended contract alleged to have been made under it were unconstitutional and void, as being in conflict with the Constitution of the State of Connecticut, and with Section 1 of Article XIV. of the Amendment to the Constitution of the United States.

The parties were at issue upon that demurrer, the railroad company, the applicant there, the defendant in error here, alleging and insisting upon the constitutionality of that special Act and the pretended agreement under it, as the sole ground of its application—the sole foundation of its claimed right to take the land; and the respondents there, the plaintiffs in error here, asserting its unconstitutionality as against the provisions of the Constitution of the United States above referred to, and claiming immunity, under the Constitution of the United States, from the attempted assault upon their property rights involved in the proceedings.

The demurrer was overruled by the Judge of the Superior Court and he made the same ruling in substance in his final judgment, and both of those rulings were appealed from to the Supreme Court of Errors. See p. 34 of the Record.

All the other points in the appeal were disposed of by the Supreme Court as immaterial.

The questions of evidence, as to the alleged consent of the city to the pretended agreement, were ignored, upon the ground that in the opinion of the Court it was not necessary, under said special Act, that the city should approve of the agreement.

So, the sole question before the Supreme Court of Errors of the State of Connecticut was, that of the constitutionality of the Special Act of the legislature, and the pretended agreement thereunder; a question raised in that Court twice, first, in Wheeler & Howes' appeal from the decision of the Supreme Court Judge in overruling their demurrer, and second, in their appeal from the decision of that Judge in his final judgment overruling their claims as made upon the trial.

The judge of the Superior Court had held the Act to be constitutional. If he had held otherwise the application would necessarily have been dismissed, and no appraisers would have been appointed.

It was the decisive question in the case.

That decision of the Judge of the Superior Court Wheeler & Howes took by appeal for review in the Supreme Court of Errors. Wheeler & Howes claimed that the Judge of the Superior Court erred in holding the Act to be constitutional. If the Supreme Court had held that the decision of the Judge of the Superior Court was erroneous, then the whole action of the Judge of the Superior Court would have been set aside, the appointment of appraisers would have fallen, and the condemnation proceedings would have been at an end.

The Supreme Court, however, found no error, thereby necessarily holding the Act to be constitutional, thereby deciding in favor of the *validity* of the statute, and an authority exercised under a State, the validity of which was drawn in question on the ground of their being repugnant to the Constitution of the United States; thereby also deciding against the title, right,

privilege and immunity specially set up and claimed by the land owner under the Constitution of the United States.

There were no other material issues or claims involved in that decision—and they *were* involved, *necessarily* involved.

It passes our comprehension, therefore, how it can be claimed that they were not.

It would be no more surprising, it seems to us, if it should be seriously argued that this case had never had any existence at all, and that all the proceedings from beginning to end were merely the figment of a disordered imagination.

Of course, we are aware that in the opinion of the Court various suggestions are made with a view to obviating the Constitutional issue.

It is said that the Railroad Company might proceed under the general law, without regard to the special Act in question. But the trouble is that the Railway Company *did not*. It had its eye on the money that it expects to take from the pockets of Bridgeport taxpayers for its own private advantage, and in violation of the Constitution of the State of Connecticut, under the disguise of grade crossing elimination.

The general law of the State upon that subject did not offer such advantages. Therefore the Railroad Company resorted to the legislature, and having by its well known agencies and methods there obtained the desired contrivance, it proceeded to make use of it. By and by it expects to come to the city with its bill for several hundred thousand dollars to assist it in paying land damages incurred in these proceedings. If the bill is questioned, it proposes to say, "why I have taken this land under the special Act, which provides that we may levy one-sixth of all the expense of our own new railroad plant from border to border of the city of Bridgeport upon the taxpayers of that city."

Therefore, however interesting the theory set out in the opinion of the Court may be that the railroad corporation *might* have proceeded under the general law, the simple truth is, on the record of this case, which cannot be gainsaid or

ignored, that the Railroad Company *did not proceed* under the *general* law, but under this special Act. The suit it instituted against Wheeler & Howes was based from beginning to end on that special Act. The only issues in the case, passed upon by the Supreme Court and upon which the whole case turned, were the issues before referred to, both involving, and indeed consisting of, the one question of the validity of that Act under the Constitution of the United States.

There is another suggestion in the opinion of the Supreme Court of Connecticut which aims at the avoidance of the constitutional question.

It is said that there are two sides to the special Act in question; one which provides that the Railroad Company and the three persons named in the Act may construct a contract for the city, and that then the city or Railroad Company, or either, may take land to carry out the provisions of that contract; another which provides that if such a contract is not made, then the railroad commissioners may order the work done and determine how it shall be paid for; and that therefore whether the first part of the Act is constitutional or not, and whether the alleged contract was void or not, yet the Railroad Company might have taken this land under the second part of the Act, inasmuch as it appears that the scheme, as indicated in the alleged contract, had met the approval of the railroad commissioners.

The answer to that suggestion is, whether or not the Railroad Company *might have* proceeded under the second part of the Act, *it did not do so.* It *did* not allege in its application, in the suit it brought against Wheeler & Howes—the suit that said Wheeler & Howes defended—the suit that the Superior Court Judge tried and decided—the suit that was taken to the Supreme Court for review and was there tried and decided;—in *that suit* the Railroad Company *did not* allege that the city and Railroad Company *failed* to make the contract provided for in the first part of the statute, and that *therefore* the rail-

road commissioners adopted the scheme, plan, and specifications described in the record; and that the Railroad Company is now seeking to condemn this land on *that* ground. Not at all. That would have been an entirely different suit, calling for entirely different pleadings and issues and evidence, and involving other and different questions.

The two theories of proceedings, the one suggested by the Court, and the one actually adopted in the case by the applicant, are not only widely different, but are inconsistent with each other—so inconsistent that they could not be combined in one proceeding. The allegation of one, gives the lie to the other. Especially under the Connecticut code of practice, which requires truthful statement and condemns fictions, or allegations not believed to be true, how could these two theories be reconciled and advanced in one application?

The railroad commissioners had no *jurisdiction* to proceed independently under the special Act at all, *except* in case *no agreement* was reached, as provided for in the first part of the Act. If an agreement *was* reached, all the commissioners could do was to approve or disapprove. If they approved, that perfected the scheme as contemplated under *that* part of the Act.

Now, the *allegation* is that the agreement *was made.* The application is brought pursuant to the agreement and to carry out its provisions.

The Court says in its opinion (Record, p. 41) "The two purposes of the Act of 1895 were first, the removal of all existing grade crossings in Bridgeport, and the construction in the most feasible manner, after considering the interests of the public, the rights, responsibilities, and duties of the railroad, and of the city, and the rights of other parties concerned, of a four-track railroad through the city in such a way as to avoid crossing any highway at grade; and second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so in-

tended to be by the Act, that neither the right of the railroad company to perform the work, according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depend upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made, as authorized by section 2, the commissioners after the work shall have been completed, shall apportion the entire expense among the proper parties."

This is the argument of the Court to show that in this case the question of the constitutionality of the first part of the statute and of the pretended contract are not drawn in question.

"If no agreement shall have been made."

But the application proceeds upon the supposition and allegation that such an agreement *has been made*, thereby necessarily implying that the Act in authorizing the agreement, and the agreement made under it, are valid in all respects.

If that allegation was not true, the applicant failed to make out the case, and the judgment should have been in favor of Wheeler & Howes.

If it was true, the commissioners had no power to apportion the expense of the work among the proper parties after it was completed, for that matter was disposed of by the agreement, and the case supposed by the Court has no possible connection with the one under consideration.

In the case actually before the Court—the case set up in the application—the right of the railroad company to perform the work, according to the plans approved by the commissioners, and the power of the commissioners to compel its performance, *did* depend entirely upon the previous apportionment of the expense between the parties who should bear it.

Because that apportionment was an essential and inseparable feature of the alleged agreement, it could not be elimin-

ated and leave any agreement at all, and the right alleged and claimed and disputed and passed upon by the Court was a right *to proceed under that agreement and nothing else*, and that question necessarily involved the question of its constitutionality of the agreement and of the Act under which it was claimed to be made.

We, therefore, with all due respect, beg leave to say that the argument by the Court, in its opinion, has no relevancy whatever to the case before it or to the judgment it rendered.

Moreover, if the case was such as supposed by the Court, even then the constitutional question was necessarily involved.

It was still a question of the validity of some portions of the Act in question, and the claim set up by Wheeler & Howes was that the *entire Act* was *necessarily unconstitutional*, because of *some of its inseparable features*.

If the Court holds any part of the Act to be constitutional against that claim, it is within the jurisdiction of this Court to review the judgment. Moreover, whether the statute is severable, and one part can be held constitutional without tainting the other part, are questions necessarily involved in the claim made by Wheeler & Howes under the constitution, and are therefore reviewable here and within the jurisdiction of this Court for that purpose.

Foster vs. Kansas, 112 U. S. 205.
Chicago B. & Q. R. R. Co. vs. Chicago, ~~166~~ 166 U. S. 205.
Kantuana Water Power Co., vs. The Green Bay & M. Canal Co., 142 U. S. 254-282.
Wilson vs. Black River Creed Marsh Co., 27 U. S. (2 Peters) 245.
Armstrong vs. Athens Co., 41 U. S., (16 Peters) 281.
Chicago Life Ins. Co. vs. Needles, 113 U. S. 574.
Eureka Lake and T. Canal Co. vs. Yuba County, 116 U. S. 410.

We therefore insist that the Court has jurisdiction and the motion to dismiss ought not to prevail.

The Motion to Affirm.

If the Court has jurisdiction, no reason is shown for proceeding with it in any other than the usual manner.

The question is a grave one, and the interests involved are most important.

It cannot be seriously claimed that it is *frivolous* to insist, that a special Act of the legislature that gives a railroad company power to sit as a judge between itself and the taxpayers and landowners of a municipality in a matter of several million dollars, and to determine what proportion of that amount such taxpayers should pay, is unconstitutional, or that such an Act of the legislature and proceedings claimed and alleged to be under and by virtue of it, which take private property for purposes prohibited and declared not to be public by the constitution of the State where the property is seized, are unconstitutional as not being due process of law.

Some remarks may be found in the brief filed by the railroad company as to the seriousness of the danger resulting from the existence of these grade crossings, and the delay that has attended their removal, and the importance of a speedy determination of this action, insinuating that Wheeler & Howes have been responsible for the postponement of an important public improvement.

At the same time it stands admitted that under the general law of the State of Connecticut it has been the duty and completely within the power of the railroad company for a period of many years, to remove all the grade crossings at its own expense, and to render them safe by proper guards and precautions even while they existed.

It also cannot be truthfully denied that every grade crossing in Bridgeport might have been eliminated by the railroad company without the condemnation of a foot of additional

land. Those conditions, however, were not satisfactory to the railroad company.

It desired, in addition to the removal of grade crossings, to enlarge and improve its plant in other respects and to make the taxpayers of Bridgeport contribute to the payment of the entire expense, purposes which could not be accomplished under the general law, and which were expressly prohibited by the constitution of the State.

It therefore procured the passage of the special Act in question, permitting it under the mask of grade crossing elimination, to take land not needed for that purpose, and to improve its private property, not only for beyond that purpose, but in a manner utterly inconsistent in some respects with that purpose—at the expense of the citizens of Bridgeport. Its efforts to carry out this lawless and avaricious design have been the primary and continuous cause of the several actions alluded to by our learned opponent in his brief. By one device and another in all this litigation before the present suit, the railroad company has successfully dodged the main issue, and now appears before this Court in the same attitude. In the first action alluded to, (Mooney vs. Clark, 69 Conn. 241) brought by a taxpayer of Bridgeport to enjoin proceedings under the Act, the argument was, that the suit was prematurely instituted, and that the city ought to have been made a party, and the plans and specifications showing the details of the work were not before the Court, and while some remarks are found in the opinion of the Court to the general effect that the Act was constitutional, yet it was evident from the separate opinion of two of the judges that the constitutional question was not necessarily involved.

The next step was an application to the railroad commissioners by the railroad company for their sanction of the proposed scheme. The railroad commissioners having approved it as proper in their opinion, Wheeler & Howes, the plaintiffs

in error here, then respondents, took an appeal to the Superior Court.

The railroad company, by oral representations to the Superior Court that it was proceeding under the special Act, and under the Act no appeal was allowed, obtained a judgment of the Superior Court erasing the appeal from the docket.

Upon appeal to the Supreme Court of Errors, taken by Wheeler & Howes, that judgment was reversed, the Supreme Court holding that no want of jurisdiction appeared upon the face of the appeal.

N. Y., N. H. & H. R. Co. vs. Wheeler & Howes, 70 Conn. 376.

The Railroad Company thereupon moved the Superior Court, in writing, to dismiss the appeal, setting out that the proceeding was instituted solely under the special Act in question.

Upon that ground, the Superior Court again erased the appeal from the docket and the Supreme Court of Errors, upon appeal to that Court from that decision, held it to be correct.

N. Y., N. H. & H. R. Co. vs. Wheeler & Howes, 71 Conn. 270.

Then followed the application for the appointment of appraisers—the present proceeding.

Wheeler & Howes having been so far denied a hearing upon the merits of the question, now interposed the objections which they here insist upon.

Still there is manifested a disposition to evade the issue.

Whereas we were told before that we could not be heard because it was a proceeding under the special Act, now we are informed that the special Act was not in issue at all, at least that its constitutionality or unconstitutionality is of no imaginable consequence, because the proceeding might be regarded as wholly under the general law.

The unsoundness of this latter proposition we trust we have already demonstrated, but the foregoing statement we think may be pardoned in view of the attempt made by our opponent to charge evasive or dilatory tactics upon us.

It has been held by this Court that where a federal question has been raised in a State Court, a motion to affirm will be granted only where the same question has been often determined by this Court adversely to the plaintiff in error so that the rule must be regarded as settled.

Walston vs. Nevins, 128 U. S. 578.

The constitutional questions presented by this writ or error, distinctly raised as we have seen in the State Court, have never been passed upon by this Court, nor, so far as we are aware, by any State Court outside of Connecticut.

Further Argument in Opposition to Motion to Dismiss and Affirm.

At the risk of some repetition, we desire to advance a line of argument in opposition to said motion upon grounds somewhat different from those in the preceding part of the argument.

No question will be raised in this part of the argument as to the constitutionality of the special Act of 1895—that will be assumed to be constitutional.

The inquiry will be whether *the project* of the railroad company, as called for by the agreement and plans, Exhibits A and B, and as approved by the railroad commissioners, is valid and Federally constitutional.

A motion to dismiss will be overruled where a question of Federal constitutionality was directly raised by the plaintiff in error in the State Court and was decidedly adversely to him.

Foster v. Kansas, 112 U. S., 205.
Chicago B. & Q. R. Co. v. Chicago, 166 U. S., 226, 230.

And as to the motion to affirm, it is held that, where a Federal question has been raised in the State court, a motion to affirm will be sustained if the same question has been often determined by this Court adversely to the plaintiff in error; but not otherwise.

Walston v. Nevin, 128 U. S., 578.

An inspection of the record shows that in this case the question of Federal constitutionality was directly raised and was decided adversely to the plaintiffs in error. This appears from the foregoing statement of the case. And on a little investigation it will also appear that the matter is important and of first impression.

The constitutional questions presented by this writ of error have never been passed upon by this Court; nor, so far as we are aware, by any State court outside of Connecticut.

In N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S., 556, it was held that proceedings for the elimination of a grade crossing which resulted in the imposition of the entire expense upon the railroad company and of no part of the expense upon the municipality were valid.

No case in this court has ever affirmed the constitutionality, in process of result, of proceedings, which involve the imposition of even a portion of the expense of such grade crossing elimination upon the municipality.

Still less has any case in this Court, or elsewhere, ever affirmed the constitutionality of proceedings which, under the guise of providing for the elimination of grade crossings, really impose on a municipality a portion of the expense of such grade crossing elimination and also carry with such imposition an involuntary donation to the railroad company of moneys to reimburse such company for outlays not germane to grade crossing elimination, but of advantage to it in the profitable operation of its railroad.

The nature of the present case is of the character indicated in the last paragraph.

In substantiation of our affirmation to this effect we are lead into a discussion of the merits of the case.

Preliminary Claim of the Railroad Company.

As a preliminary claim, the defendant in error contends that, as the proceedings, brought up for review by this writ of error, were simply proceedings for the appointments of appraisers to estimate the damages that would accrue to the plaintiffs in error from the taking of their property by a railroad company in the exercise of the right of eminent domain; the question of whether or not the railroad company's proposed action was in violation of the Fourteenth Amendment to the Federal Constitution was not before the Connecticut Supreme Court of Errors for its consideration, nor is it now before this Court.

On the contrary we maintain: First, that by our established State practice in condemnation proceedings such a question was properly before our State court for its determination, and that the question is now before this Court; and Second, that, notwithstanding any State practice to the contrary, the Fourteenth Amendment imperatively requires condemnation proceedings to have sufficient scope to permit of such a determination.

These two points will be considered in their order.

In condemnation proceedings, under Connecticut practice, *the defendant land-owner by way of defense can question the rightfulness of the purpose for which the plaintiff intends to use the land sought to be condemned;* and if it appears that the purpose is not such as is authorized by law, the petition will be dismissed.

For many years there have been statutory provisions, now found in Conn. Gen. Sec. 1871, whereby public cemetery associations, on failure to agree with adjacent land owners, may maintain condemnation proceedings to secure land necessary for the enlargement of their territorial limits. And it has been the uniform practice in such proceedings for the court to hear and determine every conceivable question that the defendant land owner may desire to raise as to right of the plaintiff to take his land.

Thus in Edwards v. Stonington Cemetery Association, 20 Conn. 466, the defendant raised and the court considered the question of whether or not the Association was a legally organized cemetery association as contemplated by the statute, and also whether or not the land proposed to be taken would be devoted to a public use.

Both questions were answered in the affirmative. As the land owner's objections were not made to the report of the committee finding the necessity and propriety of the proposed enlargement, but were made to the application itself; the determination was one of pure law as to the association's right to take the property.

So in Evergreen Cemetery Association vs. Beecher, 53 Conn. 551, upon an application for the purpose of taking land for cemetery enlargement, on demurrer to the application, it was held that, as it did not appear that the plaintiff desired the additional land for a cemetery in which the public had or could acquire the right of burial, there was nothing to show that the land desired was to be taken for a public use and therefore the demurrer was sustained.

And in Westfield Cemetery Association vs. Danielson, 62 Conn., 319, the right of the plaintiffs to take the land was passed upon.

Petitions for the condemnation of land to be used for flowage purposes, under Gen. Stat., Sec. 1216, have been prolific

in inquiries as to the publicity of the purpose to which the land was to be devoted; the practice has been constant that such questions can be raised in the very condemnation proceedings.

In Williams vs. Elting Woolen Company, 33 Conn. 353, it was even held that an injunction would not lie to restrain a plaintiff in a flowage position from maintaining his action under circumstances where it was alleged that no right of condemnation existed, for the reason that these facts could be shown in defense to the petition.

The question as to whether or not the mill for the benefit of which the land was to be used, was operated for the benefit of the public, so that the land was to be devoted to a "public use," was expressly passed upon in the following cases in the condemnation proceedings themselves.

Olinstead v. Camp, 33 Conn. 532.
Todd v. Austin, 34 Conn. 78.
Occum Co. v. Sprague Mfg. Co., 35 Conn. 496.
McArthur v. Morgan, 49 Conn. 347.
Geer v. Rockwell, 65 Conn. 316.

And in reference to this very question, of whether or not the right of the railroad company to take the land sought to be condemned may be in issue, it has been determined that the inquiry may be made and answered in the condemnation proceedings.

In New York etc. R. R. Co. v. Long, 69 Conn. 424. which was an application for the appointment of appraisers, various defenses were made and evidence was offered tending to show that the applicant railroad company had no right to take the land of the defendant.

At p. 434, the court say:

"The defendant's appeal contains a long list of assignments of error. They can, however, all be considered under the two propositions above indicated: Did the facts show that the

applicant, being a railroad company, had the right to take the real estate described for railroad purposes; and was it unable to obtain the same by agreement with the parties interested therein? And, perhaps, the third question: were any errors committed in the course of the hearing?"

It was accordingly held that there was error in that a question was excluded which tended to show that the land was desired to be used, not for railroad purposes, but for steamboat purposes.

We have therefore established the proposition that the courts of Connecticut have hitherto ruled that the law is such that a defendant in condemnation proceedings can, in the proceedings themselves, raise every question as to the right of the plaintiff to take the specific land—including the question as to whether or not the land is intended to be devoted to a public use.

And the principle that we contend for has again been enunciated in the case of the Hartford and Connecticut Western Railroad Company v. Montague, decided by the Connecticut Supreme Court of Errors, on April 4, 1900, and not yet reported.

What shall be said, then, of the language, used by the Connecticut Court in deciding the case at bar, that, as the Railroad Company claims, enunciates a different doctrine? We refer to the part of the opinion from the middle of page 40 of the transcript to the middle of page 41. Conceding this to be so will not help this motion to a successful result.

This Court has frequently held that where there have been a series of decisions by a State court apparently establishing a certain principle or practice as to local law, but where, in a case involving, as one party claims, a question of Federal Constitutional law, the highest tribunal of the State has enunciated a doctrine departing from the doctrine previously established in such a way as to avoid a decision of such Federal Constitu-

tional question, or in such a way as to enable it to decide that nothing has been done in violation of the Federal Constitution; this Court will disregard such later oscillation and will go back to the old decisions as being truly enunciatory of the local law.

Gelpecke v. Dubuque, 1 Wall. 175.

But a careful examination of the opinion of the Court will show that the real ground of decision is that, as they regard the matter, there is no basis to our claim that the taking of the property of Wheeler & Howes will be without due process of law. See transcript from middle of page 40 to middle of page 41. This part of the decision will be considered in the discussion of the case on the merits, where its consideration properly belongs.

And there is another consideration that is conclusive. Our second point in opposition to the preliminary claim of the Railroad Company was, that irrespective of any State practice to the contrary, the Fourteenth Amendment requires condemnation proceedings to have sufficient scope to permit of the determination, at some time in their progress, of the question of whether or not the defendants' property is being taken in accordance with due process of law.

This must necessarily be so for the reason, first, that unless there is opportunity to adjudicate upon the due process question in the course of the condemnation proceedings themselves, there can be no such adjudication at all prior to the taking of the property; and, second, to deny an opportunity to a party to be heard would of itself be a denial of due process of law.

First, we will show that by Connecticut practice the hearing on an application or petition for the appointment of appraisers is the only "process" of any nature anterior to the dispossession of the land owner.

"In its application to the condemnation of land for railway use, the word 'taken' in the Constitution means the exclusion of the owner from use and possession and the actual assump-

tion of exclusive possession by the railroad corporation at the termination and as the result of judicial proceedings."

Woodruff v. Catlin, 54 Conn., 277, 297.
New York etc. R. R. Co. v. Long, 69 Conn. 424, 425.
Nolan v. New Britain, 69 Conn., 668, 681 and 682.

It consequently follows that the orders of the railroad commissioners approving the plans for grade crossing elimination, even though such plans contemplated a taking of property belonging to the plaintiffs in error, did not constitute the "taking" of such property.

Dickerman v. N. Y, etc. R. R. Co., 72 Conn., 271.
Wheeler vs. New York, etc. R. R. Co., 71 Conn. 270.

Yet, on the other hand, the "taking" must be consummated with the termination of condemnation proceedings and the payment or tender of payment of the duly ascertained compensation to the land owner; for upon the happening of these precedent events, the railroad company becomes entitled to the use and enjoyment of the property by means of an execution.

Conn. Public Acts of 1899, Chap. 3.

Section 1 of this Act reads, "When, under the provisions of any statute authorizing the condemnation of land in the exercise of the right of eminent domain, an appraisal of damages shall have been returned to the clerk of the Superior Court, as provided by law, and when the amount of appraisal shall have been paid or secured to be paid or deposited with the treasurer of the county, as provided by law, any judge of the Superior Court may, upon application and proof of said payment or deposit, order said clerk of the Superior Court to issue an execution commanding the sheriff of the county to put the parties entitled thereto into peaceable possession of the land so condemned."

Consequently the process by means of which the property is taken, and the process which the Constitution requires shall be "due process," must be the condemnation proceedings themselves; that is the petition for the appointment of appraisers the action of the court upon the petition and in appointing appraisers, and the action of the appraisers pursuant to their appointment. The process resulting in in the taking of property, not being, as above shown, anterior nor subsequent to the condemnation proceedings, is narrowed down to and is co-extensive with these very proceedings.

But, second, the condemnation proceedings, to the limits of which any such hearing is confined, cannot be conducted in a manner consonant with "due process" if the property owner is denied the opportunity to make a contest as to the public character of the use for which the railway corporation proposes to devote the property.

Where a plaintiff sues to obtain a judgment, the defendant has a constitutional right to defend, so as to put in issue all matters of law and fact necessary to sustain such judgment; the constitutional right of defense is co-extensive with the attack. Every defendant must have a day in court long enough to permit him to be heard as to every matter that affects him.

"Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable." Anything less than this is not "due process of law."

Windsor v. McVeigh, 93 U. S. 277.
Hovey v. Elliott, 167 U. S. 409.

Condemnation proceedings are like any other action in this respect.

Searl v. School District No. 2, 124 U. S. 197.
Boom Company v. Patterson, 98 U. S. 277.
Pacific Railroad Revoval Cases, 115 U. S. 1.
N. Y., N. H. & H. R. R. Co. v. Long et al., 69 Conn. 437.

And it has been expressly adjudicated by this Court in accordance with our claim.

A pecularity of the Illinois procedure on condemnation proceedings has been that the land owner is not permitted therein to defend or to be heard in anything except as to the amount of damages he should receive.

Smith v. C. & W. I. R. R. Co., 105 Ill. 511.

Yet this Court has decided that such a defendant has an inherent right in some way to make a defense involving a question of Federal Constitutional law.

"It is not, therefore, important that the defendant neither filed nor offered to file an answer especially setting up or claiming a right under the Constitution of the United States. It is sufficient, if it appears from the record that such right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court. . . . . The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule, this Court said in Proprietors of Bridges v. Hoboken Land and Improv. Co. 68 U. S. 1 Wall. 116, 143, 'is that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In Roby v. Colehour, 146 U. S. 153, 159, it was said that 'our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' DeSaussure v. Gaillard, 127 U. S., 216, 234; Brown v. Atwell, 92 U. S., 317; Chicago L. Ins. Co. v. Needles, 113 U. S., 574, 577; Sayward v. Denny, 158 U. S., 180, 183. There, is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted

by the defendant under the national Constitution was not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits."

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S., 226, 231 and 232.

The conclusion is irresistible that the question of whether or not the property of the plaintiffs in error is being taken in accordance with due process of law, was passed upon by the Connecticut Court in such a way as to be reviewable by this Court.

The Federal Constitutional Question.

Having met, as we believe, this preliminary objection, there is presented for consideration the main question in this case: *Is the property of the plaintiffs in error being taken in accordance with due process of law?*

It is a fundamental proposition of constitutional law that private property can be taken under the right of eminent domain only for public uses; and any attempt to take private property for a non-public use would be a violation of the Fourteenth Amendment.

The question whether private property has been taken for any other than a public use is a Federal question, notwithstanding the absence of any prohibition in the Federal Constitution which is applicable to the state authority against taking property for any but a public use, when the taking for any other use is alleged to be a deprivation of property without due process of law.

Fall Brook Irrg. Dist. v. Bradley, 164 U. S. 112.

"The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

Missouri Pacific R'y Co. v. Nebraska, 164 U. S. 403, 417.

In that case the prohibited taking consisted in the attempt on the part of the Nebraska State Board of Transportation to compel a railroad company to surrender a part of its land to private persons for the purpose of building and maintaining upon it a grain elevator for their accommodation in storing merchandise for delivery to the railroad.

Whether the purpose for which the private property is sought to be taken is a non-public purpose is a constitutional question which this Court can review irrespective of the adverse determination of the State court.

See authorities cited at p. 417 in support of the proposition last cited.

When is the Taking of Property for a "Public Use"?

It is conceded by Wheeler & Howes that this track is wanted for a four-track railroad along a line of reduced curvature for the construction of which the city of Bridgeport, by its legislatively appointed agents, has agreed to contribute, and that this work, including the contribution by the city, has been approved by the railroad commissioners. No appeal lay from this approval of the railroad commissioners.

Wheeler v. N. Y., etc. R. R. Co., 71 Conn. 270.

But from the concession that the land is to be "*in fact* taken for public use," i. e., a four-track railroad (transcript, p. 39), the Connecticut Court proceeds to argue that, whether or not the city can be compelled to reimburse the railroad company for a portion of its outlay, is immaterial to the question. See transcript, middle of p. 39 to end.

This is an utter begging of the question.

The reasoning is that the taking of this property is only "one step in carrying out the proposed plan" of the railroad company and that as it has the general right to condemn land for

railroad purposes it might have condemned this land, without having made an agreement whereby part of an unconstitutional charge will be imposed on the city of Bridgeport.

"It is a condition that confronts us and not a theory." The question is not what the railroad company might have constitutionally done, but whether what it has actually done is constitutional.

Our claim is that in determining whether this land is to be taken for a public use, regard is not to be had merely to the immediate purpose of the railroad company, but also to the legality and constitutionality of its entire plan, and, if its entire plan is tainted with illegality on unconsti utionality, there can be no such publicity of purpose as will justify the exercise of the high prerogative of eminent domain.

Obsta principiis is a sound maxim where constitutional rights are in danger of being encroached upon.

Mooney v. Clark, 69 Conn. 244.

Upon the merits of the case it is encumbent on Wheeler & Howes to establish two propositions:

First, that the reinbursement of the city of Bridgeport to the railroad company of a portion of the expense to be incurred by it in carrying out its project will be in whole or in an inseparable part an expenditure of money by the city for a non-public use.

Second, that the non-public character of this proposed expenditure by the city so vitiates the project of the railroad company that it cannot invoke the power of eminent domain as a means of acquiring the property of Wheeler & Howes.

These propositions will be considered in their order.

The criterion of what constitutes a public use is difficult of determination. Broad considerations of public policy, affecting the interests of the state and society in their interests as a whole, are chiefly decisive.

"Public use may therefore well mean public usefulness, utility, or advantage, or what is productive of general benefit; so that any appropriating of public property by the State under its right of eminent domain for purposes of great advantage to the community is a taking for public use."

Olmstead vs. Camp, 33 Conn., 532, 546.
Fallbrook Irrigation District vs. Bradley, 164 U. S. 112.

It is safe to affirm, however, that no purpose, manifested on the part of a private corporation seeking to exercise the right of eminent domain under power delegated to it by the legislature, will be for the public good if it appears that the exercise of the power will be in furtherance of a scheme contrary to law, especially if such law is the fundamental law of the State. No such unrighteous end will justify as a means the invocation of the high prerogative of eminent domain. That cannot be a public use resulting in "public usefulness, utility or advantage, or what is productive of general benefit," where private property will be taken to aid in carrying out a project violative of a provision in the State constitution.

Within its proper limits, no power exercisable by the State, is more invincible than that whereby private property is taken for public use. Outside of its proper limitations, no power is or should be so weak. Next to life and liberty, the rights of property demand the highest judicial protection. How zealous, therefore, should be its courts to examine to the uttermost every invocation to them which will deprive a citizen of his property against his will and transfer it to some corporate creature of the legislature? It is a familiar maxim that he who comes into equity must come with clean hands. Much more must this be required of those who banded together in corporate form come into court demanding that their fellow citizen shall surrender to them his property. There must be a purity, like Cæsar's wife, above suspicion.

"The rule of strict construction of condemnation statutes is especially applicable to delegations of the power by the legis-

lature to private corporations. The motive of the promoters of such corporations is usually private gain, although their creation may subserve a public service. When such corporations claim to exercise this delegated power, the rule of strict construction accords with the ordinary rule that delegations of public powers to individuals or private corporations are to be strictly construed in behalf of the public, and by the other principle that private rights are not to be divested except by the clear warrant of law."

Matter of Poughkeepsie Bridge Company, 108 N. Y., 491.

In Loan Association vs. Topeka, 20 Wall, 655, Mr. Justice Miller says:

"The subject of aid voted to railroads by counties and towns has been brougnt to the attention of the Courts of almost every State in the Union. It has been frequently discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations to build railroads and to lend their credit to such corporations. Also to levy the necessary taxes upon the inhabitants, and on property within their limits subject to general taxation, to enable them thus to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether. State vs. Wapello Co., 13 Iowa, 388. Hanson vs. Vernon, [27 Iowa, 28]; Sharpless vs. Mayer, [21 Pa. St. 147, 167]; Whitney vs. Fond du Lac, [25 Wis. 188].

"In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public purpose, *a purpose or object which it was the right and duty of state governments to assist by money raised from the people by taxation.* The argument in opposition to this

power has been, that railroads built by corporations organized mainly for the purpose of gain—the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way * * *

"We have referred to this history of the contest over aid to railroads by taxation to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was issued could no longer justly be claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an unauthorized invasion of private right. Olcott vs. Supervisors, 16 Wall, 689; People vs. Salem, 20 Mich. 452; Jenkins vs. Andover, 103 Mass. 194; Dill. Mun. Cor. sec. 587; 2 Redf. R. R., 398, rule 2." * * *

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose."
Loan Association vs. Topeka, 20 Wall. 655.

The most thoughtful and eminent jurists have condemned as unsound in principle and disastrous in consequence the doctrine that municipal aid may constitutionally be given to railroad corporations.

1 Dillon on Municipal Corporations, (4th ed.), §§ 153 et seq. and 508.

Cooley on Constitutional Limitations, (6th ed.), pp. 263–269.

In Connecticut, however, up to 1877, such municipal aid was held to be constitutional.

Bridgeport vs. Housatonic R. Co. 15 Conn. 475.

Society for Savings vs. New London, 29 Conn. 174.

Douglass vs. Chatham, 41 Conn. 211.

The reckless incurring of indebtedness for railroad projects in various forms by municipalities under legislative license had become such a crying evil that in 1877 the people effectually

prohibited the practice by the adoption of the Twenty-fifth Amendment to the Constitution of Connecticut. The part here applicable is as follows:

"No county, city, town, borough, or municipality, shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of any such corporation."

So far as any judicial intimation by the Connecticut Court exists in relation to the meaning of this amendment, it is in favor of the contention of Wheeler & Howes.

Mooney vs. Clark, 69 Conn. 241, at p. 257.

As to that case it may be well right here to observe that the only question there decided was that the Special Act of 1895 for the elimination of grade crossings in Bridgeport and the agreement entered thereunder are, on their face, *i. e., apart from the particular features disclosed by the plans, Exhibit B,* constitutional and valid. For the conclusion of the decision is "The Special Act is constitutional."

69 Conn. at p. 249.

The special Act is quoted at p. 249.

Such was the only question presented in that case. But, even so, two judges deemed it their duty to utter a warning against the decision being taken too broadly, and carefully pointed out that if it should be made to appear that the arrangement in question really called for the city to contribute towards an expense not germane to the work of eliminating grade crossings, it would be in contravention of the XXVth Amendment of the State Constitution.

Previous to the XXVth Amendment, adopted in 1877, as before observed, money donated by a municipality in aid of railroad corporations was deemed to be intended for a public use.

The obvious purpose and effect of this Amendment was to make such a use no longer a public use. This has been the construction put upon such constitutional provisions in other states.

And the question as to the proper interpretation of this Amendment is open for the determination of this Court.

Pleasant Township v. Aetna Life Ins. Co., 138 U. S. 67.
Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 155.

In reference to similar language in the Constitution of Colorado, it has been stated:

"It was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription."

Colorado C. R. Co. vs. Lea, 5 Colo., 192.

See also,

Baltimore, etc., R. Co. vs. Humphrey, 74 Md., 86.
People vs. State Treasurer, 23 Mich., 499.
Thomas vs. Port Huron, 27 Mich., 320.
Webb vs. Lafayette County, 67 Mo., 353.
Allen vs. Louisana, 103 U. S., 80.

A reference to the authorities, e. g. 1 Dillon on Municipal Corporations, (4th ed.) §§ 153 et seq. and 508, and Cooley on Constitutional Limitations, (6th ed.) pp. 263-269, will show that the doctrine of the validity of municipal aid to railroad corporations was an unfortunate judicial exception to the principle that public funds cannot be used in aid of private enterprises. *The purposes of the constitutional prohibition was to eliminate this exception and to restore the principle to a condition of integrity that should never have been impaired.*

Citations will be useful as showing the scrupulous rigor with which the general principle has been applied.

Thus a law purporting to authorize municipalities to raise money by taxation to pay a certain sum to any drafted man, who served in the Civil War, or his heirs, is violate of the constitutional provision forbidding any municipality to give money or property or to incur any indebtedness in aid of any individual.

Bush vs. Board of Supervisors, 159 N. Y. 212.

"A town cannot raise money by taxation to pay the expenses of a committee directed by a vote of the town to procure from the Legislature the passage of an act, which act, when passed, is unconstitutional."

Mead vs. Acton, 139 Mass. 341.

An act authorizing a city council, for the purpose of widening streets, to cause "lots" to be assessed, and to take them at the assessed value, only relates to such portions of land as shall be actually necessary for the street. If so construed as to give the power of taking more, the act would be unconstitutional.

Dunn vs. Charleston, 1 So. Car. 189.
In re Albany Street, 11 Wend. 149.

The following quotations are verbatim from Hare's American Constitutional Law, the authorities being placed under the appropriate sentence rather than at the foot of the pages.

"Taxation has been defined as the substraction of a small portion of the constantly accumulating mass of private property for the purpose of the government by which the tax is imposed, and is distinguished from confiscation by the end in view, which is to provide for the defence, security, and welfare of the community, including the persons who pay the tax. Agreeably to the Fifth Amendment and the organic laws of the various States, 'Private property shall not be taken for public use without just compensation.' Taxation is such a taking, and would be at variance with these guaranties, but for the presumption that the citizen is benefited through the appropriation of the money raised by the tax in some just proportion to the sum which he is compelled to pay."

Hammett vs. Philadelphia, 65 Pa. St. 146, 152; Kelly vs. The City of Pittsburgh, 85 Pa. St. 170, 184; Lexington vs. McQuillan, 9 Dana,

513; Tidewater Co. vs. Coster, 3 C. E. Green, 518; The People vs. The Mayor of Brooklyn, 4 Comstock, 419, 424; Livingstone vs. Paducah, 80 Ky. 656.

"It follows that when the proceeds are by the terms of the act to be appropriated to a private purpose,—as where an act of assembly required insurance, trust, and annuity companies to pay two per cent of their gross earnings to an association for the relief of disabled firemen—the presumption is rebutted, and the tax is illegal."

"Such a measure may be termed 'taxation,' but is in effect taking the property of one man to bestow it on another, and contrary to the fundamental rule that no one shall be deprived of life, liberty, or property, save by the judgment of his peers or the law of the land."

Philadelphia Association vs. Wood 39 Pa. 73; Weber vs. Reinhard, 73 Pa. 370, 373; Butler vs. Supervisors, 26 Mich. 29.

"Had the tax been for the support of a fire department, it would have been valid, as tending to an end in which the insurance companies and the community were alike interested; but charity to disabled firemen is no more a public use than if it were bestowed on sufferers of any other class."

Parkersburg vs. Brown, 106 U. S. 487, 501.

"To warrant taxation, the purpose must consequently not only be beneficial, but concern the public. A merely private benefit is not enough, although conferred upon the parties who oppose the tax and affording an ample compensation; because under a free government, when no public considerations are involved, every man should be allowed to choose for himself. An act authorizing commissioners to construct the dikes, floodgates, ditches, and other works requisite for draining a marsh or bog at the expense of the owners, without inquiring whether the undertaking is demanded by, or conductive to, the welfare or health of the community, is therefore not less unconstitutional, if viewed merely as a tax, because the benefit will more than repay the debt."

Scott vs. Philadelphia, 81 Pa. 80; Butler vs. The Supervisors, 26 Mich. 29. See Wurtz vs. Hoagland, 114 U. S. 606; *post*, p. 289.

"So the legislature cannot authorize a municipal corporation to issue bonds for the purpose of lending them to persons en-

gaged in manufacturing within its limits, because such a grant implies the right and duty to tax as a means of payment; and the bonds will consequently be invalid if the defect is apparent, even in the hands of a purchaser for value."

Loan Association vs. Topeka, 20 Wallace 655; Parkersburg vs. Brown, 106 U. S. 487, 501; Cole vs. La Grange, 113, U. S. 46.

"A tax, as defined in Webster's Dictionary and by the Supreme Court of the United States, is 'a burden imposed by the legislature on persons or property for public purposes,' and no fact which manifestly contravenes this principle can be valid.

Loan Association vs. Topeka, 20 Wallace, 655; Butler vs. The Supervisors, 26 Mich. 29.

"The power is nevertheless plenary as to objects within its scope, and one as to which the decision of the legislature is conclusive, unless the line is passed at which the abuse of authority becomes a usurpation or excess."

Loan Association vs. Topeka, 26 Wallace, 655; Sigler vs. Fuller, 5 Vroom (N. J.) 227; Agurs vs. The Mayor, 6 Vroom (N. J.) 172; Sharpless vs. Mayor of Philadelphia, 21 Pa. St. 147.

* * * * * * *

"If the end be not public, it matters not that the individuals for whose benefit the tax is laid are numerous, nor that the object is to afford relief from the consequences of a pestilence, fire, inundation, or other general and widespread calamity. Soon after a disastrous fire, which laid a large part of the business quarter of Boston in ashes, the Governor of Massachusetts convened the legislature to devise measures in aid of the city and its inhabitants; and a law was passed authorizing the city councils to issue bonds to the amount of twenty millions of dollars, and loan them to the persons whose buildings had been consumed, to assist them in rebuilding. The law was held to be unconstitutional, as empowering the city to contract an obligation which would necessitate taxation for a purpose which was not less private because there were a great number of recipients, and the money was to be expended in a way that would be indirectly advantageous to the community which paid the tax."

Lowell vs. Boston, 111 Mass. 454; Loan Association vs. Topeka, 20 Wallace, 655.

"It was decided on like grounds in Weisner vs. The Village of Douglass," 64 N. Y. 91, "that the legislature could not empower a municipal corporation to issue bonds for the amount of its subscription to a company which had been incorporated by the state with authority to erect a dam across the Delaware and use the water power so obtained for manufacturing lumber and other raw materials. The use was private, although it tended to promote the growth and prosperity of the town, and might therefore in common parlance be termed public. So a municipal corporation cannot be authorized to tax the citizens for the support of a school, hospital or library, although its doors are open to the public, and a great number of persons will participate in the advantages which it confers, unless it is a public agency, or controlled and managed by the State."

Jenkins vs. Andover, 103 Mass. 94; Curtis' Adm'r. vs. Whipple, 24 Wis. 350; Whiting vs. Sheboyan and Fond du Lac R. R. Co., 25 Id. 188.

"The power would seemingly be limited, though there were no express prohibition. It is inherent in the idea of taxation that it should be for the public good, and a law taxing one set of men for the benefit of another, or in furtherance of an industrial enterprise in which they were engaged would be regarded as confiscation in all civilized countries. As was well observed in The Loan Association vs. Topeka, 20 Wallace, 635, 'to lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprizes and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. Such an enactment is not legislation: it is a decree under legislative forms.'"

1 Hare's American Constitutional Law, pp. 277–281.

Therefore the bestowal of money upon a railroad corporation can no longer, under the XXVth Amendment of the Connecticut Constitution, be for "a public use."

Pleasant Township vs. Aetna Life Insurance Co., 138 U. S. 67.

"A constitutional provision prohibiting a municipal corporation from aiding a railroad by subscriptions or donations would, it is hardly necessary to say, place it beyond the power of the legislature to empower municipal corporations to grant such aid."

2 Elliott on Railroads, § 820.

Norton vs. Board of Commissioners, 129 U. S. 479.

Wadsworth vs. Supervisors, 102 U. S. 534.

Buffalo etc. R. Co. vs. Falconer, 103 U. S. 821.

Kelley vs. Town of Milan, 127 U. S., 139, 154.

Mayor etc. vs. Gilmore, 21 Fed. Rep. 870.

Taxpayers etc. vs. Tennesse R. Co., 11 Lea, 329.

List vs. Wheeling, 7 W. Va. 501.

And the project of the railroad company would also result in the taking of the property of the taxpayers of Bridgeport without "due process of law," guaranteed by Section 1 of Article XIV of the Amendments to the Federal Constitution.

City of Bay City, vs. State Treasurer, 23 Mich. 499.

In re Opinion of the Justices, 58 Maine, 590.

It does not affect this conclusion that municipalities may voluntarily or involuntarily contribute towards the expense of removing grade crossings. That is still constitutionally legitimate. This is so because grade crossings are a nuisance for the existence of which the municipality and railroad company are equally responsible.

Woodruff vs. Catlin, 54 Conn., 277.

Town of Westbrook's Appeal from R. R. Commissioners, 57 Conn., 95.

N. Y. & N. E. R. R. Co.'s Appeal from R. R. Commissioners, 58 Conn. 532.

Woodruff vs. N. Y. & N. E. R. R. Co., 59 Conn. 63.

State's Attorney vs. Selectmen of Branford, 59 Conn. 402.

N. Y. & N. E. R. R. Co's Appeal from R. R. Commissioners, 62 Conn. 527.

State ex rel. N. Y. & N. E. R. R. Co. vs. Asylum Street Bridge Com., 63 Conn. 91.

In N. Y. & N. E. R. R. Co.'s Appeal, 57 Conn., at p. 240, the Court says:

"Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal; or that either may be required to pay the whole; and if each contributes, that the proportion which each shall pay may be determined by the legislature in each case as it arises, or by a general rule; by itself, or by a delegation of its powers to the Railroad Commissioners."

And in 62 Conn., at p. 540, the Court says:

"It being established by the legislature and by the repeated decisions of this Court that grade crossings are in the nature of nuisances and dangerous to life, the right of the legislature to cause them to be abated, and to require either party to pay the whole or any portion of the expense cannot be questioned."

Therefore any imposition upon the city of Bridgeport to pay part or all of the expense of grade crossing elimination would not be contrary to the Connecticut State Constitution.

But, as the part of the imposed expense that will go towards paying for work not germane to grade crossing elimination is not severable from that part of the expense that will go towards paying for such grade crossing elimination, the whole project is inextricably and irretrievably tainted and void.

"The scheme of the whole is indivisible. It cannot be separated into parts. It must stand or fall together."

Poindexter vs. Greenhow, 114 U. S. 269, 304.
Pollock vs. Farmers' Loan & Trust Co., 158 U. S. 429 and 601.
Norwood vs. Baker, 172 U. S. 269.
Guthrie on the Fourteenth Amendment, pp. 50 and 51.

We therefore have, as we believe, established the first proposition above put forward, to wit, that neither the city of Bridgeport nor its taxpayers, under the XXVth Amendment of the State Constitution and the XIVth Amendment of the Federal Constitution, can be compelled or permitted to reimburse the Railroad Company for any part of the expense of this project.

Our second proposition is that if the project is thus unconstitutional and void, the property of Wheeler & Howes cannot be condemned in furtherance of a project so non-public, unconstitutional and void.

The Railroad Company's own avowed purpose in taking the land of Wheeler & Howes is this:

"In order properly to carry out in any and all particulars, as called for in said plans, the work imposed upon said railroad company by special act and agreement and said order and finding of said railroad commissioners, said company deemed it necessary to take all those certain pieces or parcels of land as shown on said plans [including the property of Wheeler & Howes]. Transcript, p. 9, par. 5.

This purpose was found to be truly stated by the trial judge. Transcript, p. 22.

No authorities are necessary to establish the proposition that a railroad company in exercising the power of eminent domain, is exercising a prerogative of the State delegated to it by the State for the convenient accomplishment of some public end that the State might itself have undertaken. But the State of Connecticut, as well as the city of Bridgeport, is debarred from violating the State Constitution.

2 Elliott on Railroads, § 820 and cases *supra*.

Now, if in any given instance the State is constitutionally debarred from accomplishing any given end, any delegatee of the State is equally debarred.

We regard this as an exceedingly important proposition.

Again we quote from Hare's Constitutional Law:

"The principle that taxes shall not be laid save for a public end, applies with equal force to the right of eminent domain, which does not warrant the appropriation of land without the owner's consent where no public interest is involved, or, more accurately, unless the property is taken for some public duty which it is incumbent on the government to fulfil; and if this

essential element is wanting, it matters not that the object for which the power is exercised is beneficial to the owner, and will compensate the loss."

Taylor vs. Porter, 4 Hill, 149, 148; In the matter of Albany St., 11 Wend., 149; Helm vs. Webster, 75 Ill., 116; Pittsburg vs. Scott, 1 Pa., St. 309, 314; Palairet's Appeal, 67 Id., 479; Eldridge vs. Smith, 34 Vt., 484; Beekman vs. The Schenectady R. R., 3 Paige, 45; The West River Bridge Co. vs. Dix, 6 Howard, 507; Butler vs. The Supervisors, 26 Mich., 29.

"What the government may do in this regard directly, it may moreover do through an agency established for that end; and the right of eminent domain may consequently be delegated to an incorporated company, or to one or more individuals, for the construction of a railway or other work of a like kind, subject to the duty of keeping it open for public use when finished."

1 Hare's American Constitutional Law, pp. 336 and 337.

"There is nevertheless a preliminary inquiry: Is the use so far public that property can be taken consistently with the constitutional guaranties? These would be of little worth if the citizen could be deprived of his lands or goods by labelling that public which is essentially private; and as this question is judicial, it may be considered by the courts, and the decision of the legislature reversed if manifestly unsound."

The Concord R. R. Co. vs. Greeley, 17 N. H., 57; Palairet's Appeal, 67 Pa. St. 480, 488; Rutherford's Case, 72 Pa. St. 82; Neponset Meadow Co. vs. Tileson, 133 Mass., 189.

"It is not less clear that the object must be one which the government is entitled to effect directly under the powers entrusted to it for the common good; and land cannot therefore be constitutionally taken in this country for the erection of a building for public worship, nor, as it would seem, for an opera house or a theatre."

1 Hare's American Constitutional Law, p. 346.
State v. Guilbert (Ohio Sup.) 47 Northeastern Reporter, 551.

The mere fact that this Railroad Company intends to use the property of Wheeler & Howes for the location of a four-

track railroad does not necessarily make the taking to be one for a public use. Courts look further than the immediate purpose. The entire scheme is open to inquiry. Otherwise fraud and injustice might be perpetrated with impunity.

Therefore on condemnation proceedings it has been determined that a railroad company cannot take land for the purpose of building a spur track from its railroad to a private manufactory.

Pittsburg, W. & K. R. Co. v. Benwood Iron Work, 31 W. Va. 710.
Chicago R. Co. v. Wiltz, 116, Ill., 449.

Nor for the purpose of building a railway without termini on any public highway and for the carriage of sightseers as a source of profit.

Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 373.
See Apex Transportation Co. v. Garbade (Oregon) 52 Pacific Reporter, 573.

Nor can condemnation proceedings be maintained for the purpose of acquiring land for a cemetery association in its nature public only so far as inferable from its willingness to sell burial lots to persons, who by such purchase would become members of the association.

Matter of Deansville Cemetery Asso., 66 N. Y. 569.
Evergreen Cemetery Association, 53 Conn 531.

Nor for the purpose of aiding in its acquisition of land a corporation chartered to excavate a basin for the anchorage and mooring of vessels and to build docks and warehouses.

Matter Appl'n of E. B. W. & M. Co., 96 N. Y. 42.

Chief Justice Marshall said:

"*Let the end be legitimate, let it be within the scope of the Constitution*, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but

consistent with the letter and spirit of the Constitution, are constitutional."

McCulloch vs. Maryland, 4 Wheat. 421.

And extrinsic evidence is always admissible to show that the ulterior and the true purpose of the proceeding is not in furtherance of a taking for a validly public use.

"Looking at the articles of association alone, it appears that the company is a railroad corporation organized under the General Railroad Act for 'public use in transporting persons and property' by a railroad to be constructed between certain termini. The papers on their face show that the corporation has undertaken an ordinary railroad enterprise within the purview of the act of 1850, in aid of which the power of eminent domain may be appropriately exercised. But when we look beyond the formal document, and the actual business proposed to be conducted is considered, we find that the proposed railroad has no proper termini; that it is not a highway in any just or proper sense; that it cannot, by reason of necessary limitations, perform one part of the duty it has undertaken, viz.: the transportation of freight; that at most it can be operated but a portion of the year, and that the sole object of its construction is to enable the corporation, for a compensation to be received, to provide for the portion of the public who may visit Niagara Falls, better opportunities for seeing the natural attractions of the locality. We feel constrained to say that in our judgment this is not a public purpose which justifies the exercise of the high prerogative of sovereignty invoked in aid of this enterprise. The right of the company being challenged on this ground, the court is compelled to consider it."

Matter of Niagara Falls & Whirlpool R. Co., 108 N. Y. 384.

"The acquisition of lands for the purpose of speculation or sale, or to prevent interference by competing lines, or methods of transportation, or in aid of collateral enterprises remotely connected with the running or operating of the road, although they may increase its revenue and business, are not such purposes as authorize the condemnation of private property.

"And when the corporation claims to acquire lands under a delegation of the power of eminent domain, it must show express authority of law to justify the claim.

"The taking of private property for public uses, is in dero-

gation of private rights. It is in hostility to the ordinary control of the citizen over his estate, and statutes authorizing condemnation are not to be extended by inference or implication.

"In this case, among the purposes stated by the respondent for which the land of the defendant is required, are the construction of tenements, and of slips and docks upon the lake.

"The construction of dwellings for employees or officers, and the construction of slips for the accommodation of vessels bringing freight to, or taking it from the railroad company, are not, we think, upon the proofs before us, necessary corporate purposes, within the statute.

Renssalaer and Saratoga R. R. Co. vs. Davis, 43 N. Y. 137, 146.

"The general grant of legislative power in the Constitution of a state does not enable the legislature in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

Cole vs. City of La Grange, 113 U. S. 6 and see cases cited.

"Considering whether the power of eminent domain is sought to be exercised agreeably to the Fourteenth Amendment, 'the primary inquiry always is whether the use is public or not. If the use is not public, private property cannot be taken.'"

Guthrie on the Fourteenth Amendment, 89.
Missouri Pacific Railway vs. Nebraska, 164 U. S. 403, 417.

"There is no specific prohibition in the Federal Constitution which acts upon the states in regard to their taking private property for any but a public use. . . . . It is claimed, however, that the citizen is deprived of his property without due process of law, if it is taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court,

even where the taking is under the authority of the state instead of the Federal government.

* * * * * * *

"The Supreme Court of California has held in a number of cases that the irrigation act is in accordance with the state Constitution, and that it does not deprive the land owners of any property without due process of law; that the use of water for irrigating purposes under the provisions of the act is a public use, and the corporations organized by virtue of the act for purpose of irrigation are public municipal corporations organized for the promotion of the prosperity and welfare of the people. [Quoting California decisions.]

* * * * * * *

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law."

Fallbrook Irrigation District vs. Bradley, 163 U. S. 112, at pp. 158 and 159.
Backus vs. Fort Street Union Depot Co., 169 U. S. 557, 565.
Guthrie on the Fourteenth Amendment, 92–94.

The effect of the Twenty-fifth Amendment to the Connecticut Constitution has been to make certain features, as before specified, of the work covered by the agreement and plans, to be non-public. A permission to carry out this project by use of the power of eminent domain would therefore be a violation of the Fourteenth Amendment to the Federal Constitution in depriving Wheeler & Howes of their property without due process of law.

Wheeler & Howes will be prejudicially affected in this regard as owners of the property in question.

They will also be prejudicially affected as taxpayers of the city of Bridgeport and also as such are entitled to relief.

Resort can never be had to equity where avail can be made of common law remedies.

2 Dillon on Municipal Corporations (4th ed.) 907 and cases in the notes.

But a taxpayer is always entitled to redress against any threatened abuse or excess of corporate power.

Id. § 908.

Therefore Wheeler & Howes properly seek redress as taxpayers in this action.

It is admitted that Wheeler & Howes own the land in question. Therefore by force of law they are taxpayers.

Conn. Gen. Stat. Secs. 3802, 3809, 3814, 3827 and 3876 et seq.

Having alleged facts showing that Wheeler and Howes were taxpayers, it was unnecessary to make allegations of law to the effect that they were defending this action in their capacity of tax-payers.

Goodrich v. Stanton, 71 Conn. 424.
Morehouse v. Throckmorton, 72 Conn. 449.

The Absence of Actual Assent by the City.

It is said that the legislature of the State of Connecticut has power to provide by special laws for the removal of grade crossings, and that the work shall be done by a commission appointed for that purpose, with full power to determine, direct, and carry out the details of the work, and to apportion the expense among the parties responsible for the existence of the nuisance. It is said that the Courts of Connecticut have so decided and that in certain cases this Court has also held such legislation is constitutional.

All that may be conceded, but it does not follow that in appointing and empowering such a commission the legislature is

absolutely free from all constitutional limitations, or that merely by entitling an Act, as one for the removal of grade crossings, it can preclude all judicial inquiry into the real objects of the measure, and thus, in direct violation of the Constitution of the State, not only sanction, but enforce municipal contribution to general railroad construction.

We say it is clearly obvious, from a mere inspection of the Act itself, that its grade crossing figurehead is only a disguise, under which its author and promoter, the railroad company, has attempted to compel the citizens of Bridgeport to contribute four hundred thousand dollars to the improvement of its plant—the building of new embankments, the laying out of new tracks, the construction of spur-tracks at grade to feed its freight business, the acquisition of land for tracks and depot, the improvement of its curves and the construction of a new and costly drawbridge—all of which purposes have no necessary connection with, and some of which, are absolutely inconsistent with grade crossing elimination.

This we say makes the Act unconstitutional and all proceedings under it void, and therefore not due process of law.

Again, we insist that the Act is unconstitutional in the mode which it provides for the apportionment of the expense.

This, by the terms of the Act, is to be done by the railroad company, in connection with three persons named in the Act.

In order to make it seem more plausible, it was graciously stipulated that the city and the railroad company might, within six months after the passage of the resolution, agree upon upon all the details of the work and the apportionment of the expense.

See section 2 of the resolution as set out in the brief and statement filed upon this motion in this Court.

It should be constantly borne in mind that the application

for the appointment of appraisers, which constitutes this action, expressly alleges that such an agreement was in fact made and that the application was made pursuant to said agreement, and the Act under which it is alleged to have been made. When, however, upon the trial of the case in the Supreme Court, we urged the errors committed in the hearing before the Judge, in his rulings upon questions of evidence in support of that allegation, and in the conclusions as matters of law reached by him upon that evidence, the Supreme Court declined to pass upon the question, holding that it was entirely immaterial whether the city made, approved, assented to, or had anything to do with the alleged agreement; in short that the Act did not contemplate any agreement, but that the three men named and the railroad company together had power as a commission without the approval of the city, or its taxpayers, or anyone actually representing them to make this plan and carry it through, and to exclusively and finally determine what proportion of the expense the city should pay.

We contend that this central and controlling feature of the Act, about which all the rest of it turns and which cannot be separated from its other features, renders the whole scheme unconstitutional.

It cannot be denied that this commission was to perform, and did perform judicial functions between the city and its taxpayers and the railroad corporation.

The Act assumed that there was a joint responsibility of the city and the railroad company for the existence of grade crossings, but in what proportion they were so chargeable and how much of the expense of removal each ought in justice to sustain, the Act does not decide. That was left to this so-called commission. And upon this so-called commission thus empowered to act judicially and finally, with no provision for an appeal, and upon which the city had no actual representative, the railroad company sat as one of the judges.

It is true that it was provided that the agreement should be submitted to the railroad commissioners for their approval, but there is no provision for a hearing before them of the parties in interest; nothing looking to an adjustment of rights between the city and the railroad company, and this, apparently upon the theory that the rights of the parties had been settled by agreement between themselves by the so-called agreement, and that the approval of the commissioners is required only in the interests of the State, or the general public.

At all events, it is plain that there is no such provision here for an impartial hearing upon the question of contribution between the city and the railroad company as must be provided to constitute due process of law.

The railroad company itself, upon a question in controversy between itself and the city, involving millions of dollars, sits as a judge.

It is a violation of first principles which no subsequent hearing upon appeal, even if such were provided, could purge away.

The waters of justice are poisoned at the fountain, and no formal, perfunctory approval by Railroad Commissioners further down the stream can render them pure.

We say it is a violation of that clause of the Constitution of the United States, which provides that no person shall be deprived of liberty or property *without due process of law.*

Says Cooley, in his work on Constitutional Limitations, sixth edition, page 207:

"*A legislative act which should undertake to make a Judge the arbiter in his own controversies, would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible*

authority, neither legislative, executive nor judicial, and wholly unknown to constitutional government."

And again, in the same work, pages 506 and 507, he says:

"There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord Coke has laid it down, that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for jura naturae sunt immutablia, and they are leges legum.'"

"This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise."

"It is not left to the discretion of a Judge, or to his sense of decency, to decide whether he shall act or not; all his powers are subject to this absolute limitation; and when his own rights are in question, he has no authority to determine the cause. Nor is it essential that the judge be a party named in the record; if the suit is brought or defended in his interest, or if he is a corporator in a corporation which is a party, or which will be benefited or damnified by the judgment, he is equally excluded as if he were the party named. Accordingly, where the Lord Chancellor, who was a shareholder in the Company, in whose favor the Vice Chancellor had rendered a decree, affirmed this decree, the House of Lords reversed the decree, on this ground, Lord Campbell observing: it is of the last importance that the maxim that 'no man is to be a judge in his own cause,' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."

Again, on pages 508 and 509, after alluding to certain cases where the principle has been held not to apply the learned author continues:

"And it is very common in a certain class of cases for the law to provide that certain township and county officers shall audit their own accounts for services rendered the public. . . . *but except in cases resting upon such reasons, we do not see how the Legislature can have power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State, when framing their constitution, may possibly establish so great an anomaly, if they see fit; but if the legislature is entrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority. To empower one to a controversy to decide it for himself, is not within the legislative authority, because it is not the establishment of any rule of action and decision, but is a placing of the other party, so far as that controversy is concerned, out of the protection of the laws, and submitting him to the control of one whose interest it will be to decide arbitrarily and unjustly.*

Nor do we see how the objection of interest can be waived by the other party. If not taken before the decision is rendered, it will avail in the appellate court; and the suit may there be dismissed on that ground. The judge acting in such a case is not simply proceeding irregularly, but he is acting without jurisdiction. And if one of the judges constituting a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred in the result, not reckoning the interested party."

We have ventured to quote at such length from this standard authority, because we see from the opinion of this great jurist and constitutional lawyer, how far reaching, how fundamental, and how universal in its application this principle, that no man can constitutionally be made a judge in his own cases, is: that it applies to all proceedings, whether strictly judicial in form or not, in which there is to be determined a question of law or fact or any question of any sort, involving the con-

flicting interest of two or more parties as to their liberty or property.

It applies to Courts technically so called—to judges and juries—but it applies with equal force to inferior tribunals, to boards of appraisers, to committees, to commissioners, and to all cases where the functions to be discharged are wholly or in part, strictly or *quasi* judicial.

We apprehend, therefore, that it applies to this contrivance, this so-called commission, these three gentlemen named and the railroad company, acting as a board or commission in deciding between the City of Bridgeport and its taxpayers on the one hand, and the railroad company on the other, how far, in justice and equity, these parties respectively, are responsible for the existence of this grade crossing nuisance, and what proportion of the expense of its removal, each should bear.

The principle for which we are contending is established and illustrated by numerous decisions.

The Washington Ice Co. of the City of N. Y. vs. Price, Hopkins (N. Y.) Chancery p. 2.
Sigourney v. Sibley, 21 Pick. (Mass.) p. 101.
Hail v. Thayer, 105 Mass., p. 222.
State et al. v. Crane, 26 N. J. L. p. 394.
Lanfear v. Mayor, 23 Am. Dec. p. 477.
Queen v. Justices of Hertfordshire, 6 Queen Beuch, p. 753.
Dyer v. Smith, 12 Conn., p. 391.
Bedell v. Bailey, 58 N. H., p. 62.

ROBERT E. DEFOREST,
GEORGE P. CARROLL,
of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

JOHN M. WHEELER and
WILLIAM T. HOWES
vs.
THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY.

No. 534.

Motion to Dismiss or Affirm Writ of Error.

Comes the defendant in error in this cause and moves the Honorable Court to dismiss the writ of error herein, as this Court has no jurisdiction thereof; or to affirm the judgment, it being manifest that even if the Court has jurisdiction the the question on which the jurisdiction depends is so frivolous as not to need further argument.

WM. D. BISHOP, JR.,
Attorney for Defendant in Error.

To Robert E. DeForest, Attorney of Record for Plaintiffs in Error in the above entitled case.

You are hereby notified that the defendant in error in the above named cause will, on Monday, the 14th day of May, A. D. 1900, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion and the brief thereon hereto attached.

WM. D. BISHOP, JR.,
Attorney for Defendant in Error.

STATEMENT.

Nature of this Action.

This writ of error is taken to a judgment of the Connecticut Court upon an application by the defendant in error under a certain Special Act hereinafter set out at length (Brief, p. 3,) and under section 3461 of the General Statutes of Connecticut, Revision of 1887 (Brief, p. 10), for the appointment of appraisers to estimate the damages that may arise to the plaintiffs in error from the taking and occupation by the defendant in error, of their real estate.

The laws of Connecticut do not permit the occupation by said railroad company of said real estate until such damages shall have been appraised and paid. General Statutes of Connecticut, Revision of 1887, section 3464.

History of the Special Act.

When the General Assembly of the State of Connecticut convened at its Session of 1895, its attention was directed to the fact that The New York, New Haven & Hartford Railroad Company had, under the exigencies of its business, four-tracked its railroad and eliminated all grade crossings from New York to New Haven, except in that section which lies in the City of Bridgeport, and extends through the entire length of the city, a distance of more than four miles, and crosses, at grade, twenty-four streets, some of them the most frequented in the whole city. The completion of the four-tracking between New York and New Haven awaited the adoption of some plan by which these grade crossings could be avoided. The State would not permit the danger of these crossings to be increased by the additional tracks at grade. The city, for its own welfare, was not willing that such increase of danger

should be allowed, and the railroad shared in the same unwillingness. (Mooney v. Clark et al., 69 Conn. p. 255.)

The General Assembly at its said session passed a Special Act entitled a "Resolution Providing for the Abolition of Grade Crossings in Bridgeport." The Act is as follows:

"PROVIDING FOR THE ABOLITION OF GRADE CROSSINGS IN BRIDGEPORT.

Resolved by this Assembly: Section 1. That in order that the safety of the public may be insured, all crossings at grade over the main tracks of the railroad of the New York, New Haven and Hartford Railroad Company, in the City of Bridgeport, shall be abolished in the manner hereinafter prescribed.

Sec. 2. Said city and said railroad company may, within six months after the passage of this resolution, agree upon the manner, plans, methods, and time in which said crossings at grade shall be abolished, and upon all other matters mentioned in section six of this resolution, and what amount, or proportion, or what items of the cost thereof, including a reasonable allowance for the services and expenses of the mayor, and William E. Seeley, and Frederick S. Stevens, shall be paid by the city of Bridgeport. For the purpose of making said agreement, the mayor of the city, and William E. Seeley, and Frederick S. Stevens, of said city, are hereby empowered to act for said city, and such agreement shall be final and conclusive upon all parties concerned when approved by the board of railroad commissioners of this state, and shall then be deemed to be an order of said board and enforcible in the manner provided in section seven of this resolution.

Sec. 3. If it shall be agreed as aforesaid that any highway crossing or crossings of said railroad tracks shall be abolished by carrying the same over or under said tracks, and the grade of said highway or of any highway connecting therewith at or near said crossing is to be thereby changed, and that said city shall pay the special damages resulting to property owners from such change of grade, either or both of the parties to such an agreement shall certify that fact to the clerk of said city, and it shall thereupon be the duty of the board of appraisal of benefits and damages of said city to estimate and appraise to the owners of land abutting on the raised or lowered portion of said highway the special damages resulting to them therefrom, over and above any special benefit resulting to them from the abolition of such grade crossing and such change of grade, and to estimate and appraise to the owners of any land

situated in said city any special benefits accruing to them from the abolition of said grade crossing and said change of grade; provided, that the whole amount of benefits so assessed for said particular abolition and change of grade shall not exceed the whole amount assessed to the owners of said abutting land for said change of grade; and provided, further, that no benefits or damages for said change of grade shall be assessed to or against said railroad company. And all the provisions of the charter of said city relative to the mode of assessing benefits and damages for the lay out of streets by the common council and to appeals therefrom, and relative also to the payment of the same and to filing liens therefor and the effect of the same, are incorporated and made a part of this section, and made applicable to assessments made under this section.

Sec. 4. If, however, the agreement hereinbefore provided shall not have been made, then and in that event the board of railroad commissioners are hereby authorized and directed to determine the plans, fix the time, and order the methods by which said crossings shall be abolished.

Sec. 5. Said commissioners, upon written application to them therefor, by said city or said railroad company, are hereby empowered and directed to determine the manner, plans, method, and time in which said work shall be done and such crossings at grade be abolished. Before making such determination, said commissioners shall hold a public session in the city of Bridgeport for the purpose of hearing said city and said railroad company, and any other persons interested, relative to the manner, plans, method, and time in which such work shall be done and said crossings at grade be abolished, and shall give such notice as they shall adjudge reasonable of the time, place and purpose of said session, to said city and said railroad company and other persons, by publication in two daily newspapers published in said city.

Sec. 6. Said commissioners shall determine upon the manner, plans, method, and time in which such work shall be done and said crossings at grade be abolished, and are empowered and directed to determine and order from time to time what changes shall be made in the manner in which the tracks of said railroad shall be carried through said city, what highways or private ways shall be carried over or under the tracks of said railroad, what highways or private ways, and what parts thereof, shall be discontinued or closed, and what, if any, new highways shall be laid out; and to determine within what time and in what manner said changes shall be made. Said commissioners are authorized and directed to require said rail-

road company to make such changes in the grade, alignment, radii of curves, and location of the tracks of said company, and to make such changes in the grade, lines, and width of any street or highway within said city, whether now crossing said tracks at grade or otherwise, as said commissioners shall judge necessary and proper for the purposes of this resolution; and they shall have power to authorize and require said railroad company to construct a new drawbridge across the navigable waters of Bridgeport harbor in the line of the existing drawbridge or near the same, and between it and the lower bridge, so called, and to determine the place where the draw in said bridge shall be constructed, and the plan of the same, and said bridge shall be free of the obligations imposed by section 3503 of the general statutes. And said commissioners are also authorized and directed to make all orders in relation to said changes and to any and all matters and things appertaining thereto, including the temporary use, occupation, or closing of any street in said city, and including the number of tracks to be constructed by said railroad company, which they may deem necessary and proper for the due execution of the purposes of this resolution. And the said commissioners are also authorized and directed to order any water, gas, telegraph, telephone, electric light or power company, or street railway company, to change the location in the manner designated by the commissioners at its own expense, of its pipes, wires, poles or tracks; also to make suitable orders as to the relocation of any public or private sewer or drain pipe.

Sec. 7. After the manner, plans, methods, and time in which said work shall be done shall have been determined upon, it shall be the duty of said commissioners to cause the same to be executed, and for that purpose they may apply to the superior court for Fairfield County for writs of mandamus or for proper process either in law or equity, and said court shall have full power to grant the necessary and proper relief. And it shall be the duty of said railroad company, under the directions of said commissioners, to do all the work of excavation, construction, alteration, and grading of said tracks, streets, approaches, bridges, and abutments required in doing said work.

Sec. 8. Said railroad company and said city may jointly and severally take any land or any interest therein which they shall deem necessary properly to carry out said work in any and all particulars, as called for in said plans so determined upon, in the same manner as is now provided by statute for taking land for railroad purposes. But, whenever any land is so taken for

highway purposes, the appraisers so appointed shall, in estimating the damages to the owner or owners thereof, take into account any special benefits resulting to them from the layout of any new highway or highways, alteration in the width, line or location of any existing highway or highways, or the discontinuance of any existing highway or highways, or parts thereof, in doing said work, and only the excess of the damages, if any, over said benefits shall be awarded to such owner or owners for such taking of land.

Sec. 9. In order to facilitate the completion of said work, whenever any damages shall be awarded to any person for taking his land for highway purposes, and it shall be necessary to pay for the same before said land is entered upon and taken, it shall be the duty of said railroad company to pay the sums so awarded, and if the amount thereof is to be reimbursed to said company by said city under the provisions of this resolution, the same may be collected, with interest, from said city by said railroad company in the same manner and to the same extent that debts lawfully contracted by municipal corporations in this state are enforced.

Sec. 10. The common council of the city of Bridgeport is hereby authorized, under the corporate name and seal and upon the credit of said city, to issue bonds or other certificates of debt, and the same or the avails thereof, when sold as hereinafter authorized, may be appropriated by said common council for the purpose of paying the expense imposed upon said city by this resolution, but for no other purpose whatsoever; and said bonds may be issued in such sums and on such time and at such rate of interest, not exceeding five percentum per annum, payable semi-annually, and shall be prepared, signed, and authenticated in such manner and form, with coupons or otherwise, as said common council may determine, and the same may be sold from time to time under the direction of the mayor and the board of aldermen of said city; and said bonds or certificates when issued as aforesaid shall be obligatory upon the said city of Bridgeport to all intents and purposes, and may be enforced and collected in the same manner and to the same extent that debts lawfully contracted by municipal corporations in this state are enforced.

Sec. 11. Said city shall provide a sinking fund for the payment of the principal of the bonds or certificates hereinbefore authorized, and in each municipal year during which any of said bonds shall be outstanding, the board of apportionment and taxation of said city shall appropriate a reasonable and suitable sum for the purpose of said sinking fund, which, with

the accumulations thereon, shall be sufficient to pay said bonds or certificates at their maturity, and said sinking fund shall be in the care and under the direction of the board of sinking fund commissioners of said city; and said fund shall be securely invested by said board for the sole purpose of redeeming all of said bonds or certificates issued by this authority at their maturity.

Sec. 12. Whenever said work shall have been done and said crossings at grade shall have been abolished, said commissioners shall direct what proportion of the entire expense, including land damages, together with their expenses and clerk hire, shall be paid by the said railroad company, by the city of Bridgeport, and by the state of Connecticut, in such proportions as the commission may deem equitable, and when such payments shall be made.

Sec. 13. The decision of said board of commissioners upon all questions of the plans or methods of abolishing said grade crossings shall be final and conclusive upon all parties concerned, but any party aggrieved by any order of the commissioners concerning the apportionment of expense may appeal to the superior court for the county of Fairfield, within thirty days after such order has been passed, giving notice to the adverse parties in accordance with the provisions of section 3518 of the general statutes, and the comptroller is directed to act in behalf of the state in reference to such apportionment.

Sec. 14. After said work shall have been done and said crossings at grade shall have been abolished as provided for in this resolution, the common council of said city may direct that an amount, not exceeding one-half of the whole expense of the city therefor, be assessed upon the persons or corporations other than said railroad company whose property is specially benefited or improved thereby in proportion to such benefits; and the board of appraisal of benefits and damages of said city shall proceed to assess the same, and the provisions of the charter of said city relative to the mode of assessing benefits for the construction of sewers within said city and to appeals therefrom, and to the payment thereof, and to filing liens therefor, are incorporated into and made a part of this section and made applicable to the assessments provided for in this section.

Sec. 15. Said city is hereby authorized to purchase and said New York, New Haven and Hartford Railroad Company is hereby authorized to sell to said city the present railroad

bridge across the Bridgeport harbor, with the approaches to said bridge on either side thereof, if said city and said railroad company shall agree upon the price and terms of sale.

Approved June 22, 1895."

Special Acts and Resolutions Passed by the General Assembly of the State of Connecticut at the January Session, 1895.

Action thereunder and Subsequent Litigation.

On December 21, 1895, said railroad company and the persons designated in said Special Act to act on behalf of the City of Bridgeport, entered into an agreement, under the provisions of said Act, which was approved on January 23, 1896, by the Railroad Commissioners of the State of Connecticut, as required by the provisions of said Special Act. This agreement (Record, pp. 11, 12, 13, 14), provides the manner, plans, method and time in which the grade crossings shall be abolished, and upon all other matters mentioned in Section 5 of said Special Act, and the proportion of the cost thereof to be borne by the City of Bridgeport and the Railroad Company. The proportion of such cost to be paid by the city being one-sixth, and the proportion to be paid by the Railroad Company being five-sixths; provided, that the total cost to be paid by the city shall not exceed in the aggregate the sum of $400,000.

On April 27, 1896, one Frank J. Mooney, a citizen and taxpayer of the City of Bridgeport, brought an action in equity in the Superior Court of Connecticut, for the purpose of testing the constitutionality of said Special Act. The Superior Court declared the Act constitutional and this decision was, on appeal, affirmed by the Supreme Court of Errors of Connecticut, on May 25, 1897. (Mooney v. Clark et al., 69 Conn. 241.)

No further action was taken by the plaintiff in that case.

Since the rendition of the final judgment in the Mooney v. Clark case, the plaintiffs in error have been continuously resist-

ing in the Connecticut courts the taking of their land for the purpose of carrying said Special Act into effect.

(Wheeler et al. v. N. Y. N. H. & H. R. R. Co., 70 Conn. 326; Same v. Same, 71 Conn. 270; N. Y. N. H. & H. R. R. Co. v. Wheeler et al., 72 Conn., not yet published, being the same case upon which this writ of error is founded.)

It thus appears that by litigation of one sort or another the work of abolishing grade crossings in Bridgeport has been prevented during the entire period that has elapsed from April 27, 1896, down to the present. This condition must continue until the present writ of error shall have been disposed of. The natural increase in the population of the city and the concurrent increase in the number and speed of trains enhances the danger caused by the continued existence of these grade crossings. These suggestions are not made for the purpose of convincing the Court that these motions, or either of them should be granted, but rather with the hope that the Court will give the motions as early a consideration as a proper regard for the existing conditions may seem to require.

BRIEF.

I.

As to Motion to Dismiss.

This motion is based upon the claim of the defendant in error that this Court has no jurisdiction of this writ of error, inasmuch as no constitutional question was passed upon by the Supreme Court of Errors of Connecticut, nor does the record properly present any constitutional question for the consideration of this Court.

Statutory Authority for the Taking of the Land of the Plaintiffs in Error.

1. Section 8, of the Special Act hereinbefore set out (Brief, p. 5), provides, that "said railroad company and said city may jointly and severally take any land or any interest therein which they shall deem necessary properly to carry out said work" (i. e. the work of abolishing grade crossings) "in any and all particulars, as called for in said plans so determined upon, in the same manner as is now provided by statute for taking land for railroad purposes."

2. The statute which provides for the manner in which land may be taken for railroad purposes is Section 3461 of the General Statutes of Connecticut, Revision of 1887, and reads as follows:

"Every railroad company, after its line of road shall have been located, approved and established, may so far alter the location of such road as to change the radius of its curves, straighten and improve its lines, width, and extent of depot grounds, slopes and embankments, and extend its lines of sight, when such changes are approved by the Railroad Commissioners, and may take lands for additional tracks, turnouts, and freight and passenger stations and depots."

Action taken preliminary to Application for the Appointment of Appraisers.

Said railroad company having deemed it necessary to take the land of the plaintiffs in error properly to carry out the word of abolishing said grade crossings, "as called for in said plans so determined upon," brought its application to the Railroad Commissioners under the authority of said Special Act and said Section 3461, for their approval of the taking of said land by said railroad company; and said Railroad Commissioners after due notice to the plaintiffs in error, and after due hearing had, made their order and finding approving the

taking by said railroad company of said land. (Record, paragraphs 5 and 8, on pp. 9 and 10, and Judgment on pp. 21, 22.) The plaintiffs in error appealed from this determination of the Railroad Commissioners (thus superseding their order) to the Superior Court of the State of Connecticut (being the highest *nisi prius* court in the State) and failing to secure a favorable result in that court, they appealed (thus superseding the action of the Superior Court) to the Supreme Court of Errors of Connecticut, in which the action of the Superior Court was sustained, and the right of said railroad company to take said land became fixed. Wheeler et al. vs. N. Y. N. H. & H. R. R. Co., 71 Conn. 270.

The plaintiffs in error brought no writ of error to this Court to the judgment in the case last above cited.

History of this Application.

Said railroad company being unable to obtain said land by agreement with the plaintiffs in error, brought its application to a judge of the Superior Court of Connecticut for the appointment of appraisers under the provisions and by authority of Section 3464 of the General Statutes of Connecticut, Revision of 1887. Said section provides, "When any railroad company shall have the right to take real estate for railroad purposes, and cannot obtain it by agreement with the parties interested therein, it may apply to any judge of the Superior Court for the appointment of appraisers to estimate all damages that may arise to any person from the taking and occupation of such real estate for railroad purposes," etc. Judge Ralph Wheeler, of said Superior Court, granted said application and appointed appraisers. (Record, Judgment, pp. 21, 22.) The plaintiffs in error appealed from the decision of Judge Wheeler to the Supreme Court of Errors of Connecticut, thus superseding the same. Said Supreme Court sustained Judge Wheeler (N. Y. N. H. & H. R. R. Co. v. Wheeler et al., 72 Conn.) and the plaintiffs in error have

taken the present writ of error to that judgment, and have taken the steps necessary to have said writ operate as a *supersedeas*.

The Supreme Court of Errors Considered no Federal Question Involved.

It will be observed from an inspection of the opinion of the Supreme Court of Errors in the present case that no constitutional question was passed upon by that Court. (Record pp. 36–42.)

The Record Discloses None.

Claim of Plaintiffs in Error.

It will be observed from an inspection of the record presented to this Court that the plaintiffs in error claim the right to question the constitutionality of said Special Act 'though they appear before it in no other capacity than as *owners of the land sought to be taken.* In that exclusive capacity they claim the right to say that their property is sought to be taken without due process of law, because the *City of Bridgeport* will be required to pay the railroad company on account of expenditures not germane to the work of eliminating the grade crossings.

1. *The liability of the City is in no way fixed by this application.*

It by no means appears that the city will be called on to pay one dollar on account of any such expenditures, or, if called upon, that it will be required to pay.

2. *These plaintiffs in error do not appear as Taxpayers or as Representatives in any way of the City of Bridgeport.*

But, however that may be, the plaintiffs in error are not before this Court as taxpayers of the city. They have not alleged that they have any right or authority to represent the city or its taxpayers, or that they will be injured in any respect on account of the payment by the city of its part of the expense as fixed by the agreement, and the order of the Railroad Commissioners approving the same. They do not allege, either, that the use for which their land is sought to be taken is other than a public use. Their only claim is, and they make it *simply as owners of the land*, that the railroad company has no right to take their land for an *admittedly public use* because the Special Act contravenes the 25th Amendment to the Constitution of the State of Connecticut, and of Section 1 of Article XIV, of the Amendments to the Constitution of the United States, in that by the terms of the agreement entered into under authority of said act, the city of Bridgeport will be required to reimburse the railroad company on account of expenditures not germane to the work of eliminating grade crossings.

3. The right of the Railroad to take the land, even under the Special Act, in no way depends upon the provision that the Railroad may recover compensation from the City.

Referring again to the opinion of the Supreme Court of Connecticut, we find this language,—"But the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property, does not depend upon the obligation of the city to pay a one-sixth part of the expense of the whole, or of any portion of the work of this undertaking.

The two purposes of the act of 1895 were, first, the removal of all existing grade crossings in Bridgeport and the construction, in the most feasible manner, after considering the interest of the public, the rights, responsibilities and duties of

the railroad company, and of the city, and the rights of other parties concerned, of a four-track railroad through the city in such a way as to avoid crossing any highway at grade, and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depends upon a previous apportionment of the expense between the parties who should bear it. Section 12 as we have already said provides that if no agreement shall have been made as authorized by section 2, the commissioners after the work shall have been completed, shall apportion the entire expense among the proper parties."

This citation expresses precisely the claim of the defendant in error in the premises and would seem to be conclusive of the question of the right of the plaintiffs in error to invoke the jurisdiction of this Court.

4. The right of the Railroad to take this land is perfect under the General Statute.

Thus far the discussion has been confined to the Special Act. But if we assume, for the sake of argument, that this Court can properly take jurisdiction of the constitutionality of that act, it by no means follows that this motion should be concluded thereby. In this connection we beg to call the attention of the Court to the following extract from the opinion of the Supreme Court of Connecticut,—

"We may add that the right of the railroad company to condemn the defendants' property does not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897,

both of which are alleged in this application, the railroad company is entitled under section 3461 of the General Statutes to take the land for the uses named in the resolution."

The plaintiffs in error have not and cannot now question the constitutionality of said section 3461, (Brief, p. 10). The constitutional claims made by them apply solely to the Special Act and have not the slightest application to the general law referred to, a recourse to which, of course, has the effect that the entire expense of acquiring land for railroad purposes must be borne by the railroad company which acquires it, and by no stretch of the imagination can the City of Bridgeport be called upon to pay any portion thereof.

II.

As to the Motion to Affirm.

If this Court shall determine that it has jurisdiction of this writ of error, we desire to urge emphatically that it is manifest that the writ is taken for delay only, and that the question upon which the jurisdiction depends is so frivolous as not to need further argument.

Surely, it may properly be said here, as was said by this Court in the case of the New York and New England Railroad Co. vs. Bristol, 151 U. S. 566, that, "The jurisdiction may be said to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm."

WM. D. BISHOP, JR.,
Counsel for Defendant in Error.

A true copy of the foregoing motion to dismiss or affirm, the notice thereof, and the briefs in support thereof on behalf of the defendant in error, was this day delivered to me by W. D. Bishop, Jr., Esq., Counsel for the Defendant in Error.

Dated at Bridgeport, Connecticut, April 23, 1900. A. D.

ROBERT E. DEFOREST,
Counsel for the Plaintiffs in Error.

WHEELER v. NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 534. Submitted May 14, 1900. — Decided May 28, 1900.

Under a statute of Connecticut, a contract was entered into between the city of Bridgeport and a railroad company providing that the city should pay one sixth of the expense of abolishing grade crossings, and also of increasing the tracks of the company from two to four. Defendants, whose lands were sought to be condemned for this purpose, objected upon the ground that the agreement of the city to pay one sixth of the expense of increasing the number of tracks was a practical donation by the city to the railroad company in violation of the state constitution, and was also a taking of their property without due process of law under the Fourteenth Amendment to the Federal Constitution. *Held*, that the Supreme Court of the State having decided that the right to condemn the land did not depend upon the obligation of the city to pay a part of the expenses, and that the defendants could not prevent a condemnation by showing that the company might not afterwards obtain a reimbursement from the city, and also that the defendants, not alleging that they were taxpayers or specially interested, were not in any position to question the validity of the proceedings, it followed that their property was not taken without due process of law.

THIS was a motion to dismiss the writ of error, and in default thereof to affirm the judgment of the Supreme Court of Errors of Connecticut.

The case originated in an application by the railroad company to the judge of the Superior Court to appoint appraisers to estimate the damages that might arise to the plaintiff in error from the taking of certain real estate in the city of Bridgeport, for the purpose of carrying out an agreement between the railroad company and the city of Bridgeport for the abolition of grade crossings. This agreement, which was entered into under the provisions of an act of the General Assembly, "providing for the abolition of grade crossings in Bridgeport," provided the manner, plans, method and time in

which the grade crossings should be abolished, and the proportion of the cost thereof to be borne by the city of Bridgeport and the railroad company — the proportion of such cost to be paid by the city being one sixth and that by the railroad company five sixths, provided the total cost to be paid by the city should not exceed the sum of four hundred thousand dollars.

A demurrer to the application of the railroad company having been overruled, and a special defence in the answer having been stricken out as irrelevant and impertinent, an order was made appointing the appraisers. An appeal was taken to the Supreme Court of Errors, which affirmed the judgment of the judge of the Superior Court, and defendant sued out this writ of error, which defendant in error moves to dismiss for want of jurisdiction, or to affirm, upon the ground that the question upon which the jurisdiction depends is frivolous.

Mr. William D. Bishop, Jr., for the motion.

Mr. Robert E. DeForest and *Mr. George P. Carroll* opposing.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Plaintiffs assign as error that, in view of the fact that, by the agreement between the city and the railroad company, it was provided that the city should pay one sixth of the entire cost of the land required *for the construction of a four-track road*, as well as of all damages resulting from the changes of grade, there would be a reimbursement to the company for expenses in doing work and acquiring land not necessary or germane to the work of eliminating crossings at grade of the two present main tracks over the highways; and that, under these circumstances, the condemnation of defendants' property will be in furtherance of a scheme, whereby the city of Bridgeport will contribute and donate to such company the credit, money and property of the city, and of its property owners and taxpayers, in aid of the railroad company, contrary to the provisions of the twenty-fifth amendment to the constitution of

the State of Connecticut, and the taking and condemnation of said Wheeler and Howes' said property will be a taking thereof without due process of law, etc.

1. We cannot say that there is no Federal question in this case. In their demurrer to the application of the railroad company, plaintiffs in error relied upon the unconstitutionality of this special act of the Connecticut legislature as contravening the twenty-fifth amendment to the constitution of the State, and the Fourteenth Amendment of the Federal Constitution. The amendment to the state constitution provides as follows: "That no County, City, Town, Borough, or other municipality, shall ever subscribe to the capital stock of any railroad corporation, or become a purchaser of the bonds, or make donation to, or loan its credit, directly or indirectly, in aid of any such corporation."

The claim was, not that it was unconstitutional for the city of Bridgeport to pay for a part of the work for grade crossing elimination, but that the pay for work for the benefit of the company, in the construction of a four-track road, which was not necessary or germane to the work of grade crossing elimination, would be contrary to the above amendment to the state constitution; and therefore that, as the land of Wheeler and Howes was to be taken to carry out a part of the project, to be paid for in part by the city, not necessary or germane to the work of grade crossing elimination, their property would be taken without due process of law. The substance of the defence seems to have been that the land was not taken solely for the purpose of abolishing grade crossings, but also for the purpose of laying two extra tracks, and making the road through the city of Bridgeport a four-track road instead of an ordinary double track. It seems that the railroad company had laid a complete four-track road all the way from New York to New Haven, except in that section which lay in the city of Bridgeport—a distance of more than four miles, and crossing at grade twenty-four streets, some of them the most frequented in the whole city. There is no doubt that the special act did authorize an increase in the number of tracks, and there was some reason for saying that in requiring the city to pay one sixth of

the expenses incurred for this purpose, it was making a donation in aid of the railroad company in violation of the twenty-fifth amendment to the state constitution, and as Wheeler and Howes were property owners and taxpayers of the city, they were incidentally affected by this, and therefore their lands were illegally taken.

2. But assuming that there was color for the motion to dismiss, we are clearly of the opinion that the decree of the Supreme Court of Errors should be affirmed. That court had already decided, not only that the legislature might compel the removal of grade crossings and the payment of the expenses therefor, either by the railroad company or by the city, or by both, *Woodruff* v. *Catlin*, 54 Conn. 277, (a case arising under a former act,) and that a statute compelling the removal of grade crossings, as well as imposing upon the railroad the entire expense of the change of grade, was constitutional, *N. Y. & N. E. R. R. Co.'s Appeal*, 58 Conn. 532; *N. Y. & N. E. R. R.* v. *Bristol*, 151 U. S. 556; but the very act in question in this case has also been held to be constitutional. *Mooney* v. *Clark*, 69 Conn. 241. That court also held in this case that, whether the land be taken only for the purpose of abolishing grade crossings or to straighten its line and construct additional tracks, the taking is in either case for railroad purposes and for a public use. It also held that the right of the railroad company to condemn defendants' property did not depend upon the validity of any part of the special act of 1895, since by the resolution of the board of directors of the company in July, 1896, and by the approval of the commissioners in June, 1897, both of which were alleged in the application, the railroad company was entitled under section 346 of the General Statutes to take the land for the uses named in the resolution.

The plaintiffs in error contended before the Supreme Court of Errors, as they contend here, that the agreement and order made in pursuance thereof, imposing upon the city a proportion of the expense of constructing the two additional elevated tracks, not necessary to the work of eliminating grade crossings, violated the state constitution as well as the Constitution of the United States. "But," said the court, "if the railroad company

desires to take this property as one step in carrying out the proposed plan, the defendants cannot prevent it upon the ground that the company may not afterwards be able to obtain reimbursement from the city. The ability of the defendants to obtain payment of their damages does not depend upon the right of the railroad company to collect a part of it from the city. Before taking the land the company must compensate the defendants." It was further said: That even if the employment of appraisers had established the liability of the city to pay a proportion of the expense of laying the additional tracks, such a defence was not open to the defendants, because they have not alleged that they were taxpayers or had any right or authority to represent the city in such proceedings, or that they will be injured in any respect from the payment by the city of its part of the expense of the work as fixed by the agreement and order. "But," says the court, "the appointment of appraisers in this proceeding does not affect the question of the liability of the city to pay that part of the expense ordered by the commissioners. The right of the railroad company to have appraisers appointed and to take this property does not depend upon the obligation of the city to pay a one sixth part of the expense of the whole, or of any portion of the work of this undertaking. The two purposes of the act of 1895 were: First, the removal of all existing grade crossings in Bridgeport, and the construction, in the most feasible manner, after considering the interest of the public, the rights, responsibilities and duties of the railroad company, and of the city, and the rights of other parties concerned, of a four-track railroad through the city, in such a way as to avoid crossing any highway at grade; and, second, a just apportionment of the cost among those who ought to bear the expense of performing the work in the manner determined. These two purposes are so far distinct and separable, and are so intended to be by the act, that neither the right of the railroad company to perform the work according to the plans approved by commissioners, nor the power of the commissioners to compel its performance, depends upon a previous apportionment of the expense between the parties who should bear it. Section 12, as we have already said, provides that if no agreement shall have been made as authorized by section 2,

the commissioners, after the work shall have been completed, shall apportion the entire expense among the proper parties."

The court intimated no opinion as to whether the agreement and order fixing the proportionate part of the entire expense to be paid by the city was of doubtful validity. It thought the question was one which could not properly be raised in this proceeding.

The court held in substance (1) that the right to have appraisers appointed did not depend upon the obligation of the city to pay a part of the expense, and that defendants could not prevent a condemnation by showing that the company might not afterwards be able to obtain reimbursement from the city; and (2) that the defendants, not alleging that they were taxpayers, or specially interested, were not in a position to question the validity of the proceedings. If this be so, it requires no argument to show that they are not in a position to contend that their property has been taken without due process of law. If the court had gone farther, and held that the taking of defendants' property for the purpose, not only of abolishing grade crossings, but of enabling the railroad company to lay additional tracks, was not a violation of the twenty-fifth amendment to the state constitution, that would have been exclusively a local question, and would have involved no question of an unlawful taking of defendants' property within the Fourteenth Amendment.

If the fact that the city of Bridgeport contributed to the expense of abolishing grade crossings, and incidentally thereto, to the construction of additional tracks, does no violence to the constitutional provision that no city shall make a donation in aid of a railroad corporation, as held by the Supreme Court of Connecticut, much less does it make a case of taking the property of petitioners, whether as property owners or as taxpayers, without due process of law.

The decree of the Supreme Court of Errors of the State of Connecticut is, therefore,

Affirmed.

MR. JUSTICE GRAY did not sit in this case and took no part in the decision.